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A COMPARATIVE STUDY OF NORMATIVE ASPECTS OF THE (CRIMINAL) TRIAL PROCESS IN CUSTOMARY AND MAGISTRATE COURTS IN BOTSWANA WITH SPECIFIC REFERENCE TO THE STRUCTURE OF DISCRETION OF JUDGES IN SENTENCING MATTERS

By

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Abstract

This thesis is a comparative study of outcomes of the criminal process in customary and magistrate courts in Botswana with specific reference to sentencing outcomes. The main objective of the study was to determine whether differences in the structure of the sentencing discretion of judges of customary and magistrate courts as regards the types and combinations of punishments they may impose in respect of any offence triable in either type of court resulted in the imposition of unjustifiably dissimilar punishments for similar offences. Accordingly, the study examined and compared disposals and sentencing patterns of the customary and magistrate courts more generally, and more specifically the use and severity of multiple punishment(s) awarded by the two courts in respect of similar offences in the period 1991-2001. The primary hypothesis was substantially, if only partially supported, in so far as it assumed that differences in the use and severity of multiple punishments could be explained primarily in terms of differences in the discretion of the judges as regards combinations of punishments they may employ against any particular triable-either-way offence. The study found that, though some of the differences in types and combinations of multiple punishments deployed by the two courts could be attributed to differences in the structure of the discretion as to combination of punishments as postulated, some could not be explained in those terms despite the apparent exclusive use by one type of court as against the other of particular combinations of multiple punishments. Nevertheless, the study found that when customary courts employed multiple punishments, they tended to punish more severely than magistrate courts did similar offences. This was evident from the following general patterns: (a) the variety of punishment combinations deployed by customary courts exceeded those employed by magistrate courts, sometimes by a very wide margin (b) it was not unusual for the average number of multiple punishments used to

punish a single offence in customary courts to exceed three whereas those deployed by magistrate courts rarely exceeded two (c)customary courts registered the highest severity scores across all offence groups considered (d) the severity score differentials ranged from large to very large. Taken together, these differences amounted to unjustifiable disparities between the sentencing outcomes of the two courts.

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Declaration

I declare that this thesis is entirely my own composition and that the research on which it is based was conducted by me.

Ikanyeng S. Malila

Signed: 

Date: 09/03/09

List of Abbreviations

ACHPR African….. Charter on Human and People's Rights

BLR……..……Botswana Law Report

BP……..……...Botswana Police

CCA……..……...Customary Court Act

CNS…….....Concurrent Nested Strategy

CSO……..……...Central Statistics Office

CP&E……Criminal Procedure and Evidence Act

ICCPR……..……...International Covenant of Civil and Political Rights

LP……Local Police

MCA……..Magistrate Court Act

MMR……..Mixed Method Research

OAP……..……Offences Against the Person

ORP……..……..... Offences Against Property

SPSS……...Statistical Package For Social Sciences

TMM……...Third Methodological Movement

UNICRI……United Nations Integrated Crime and Justice Research Institute

WLSA……Women and the Law in Southern Africa

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Customary Court (Amendment) Act, 1997

Customary Court (Amendment) Act, 2000

Customary Court Amendment Act, 2002

Customary Court Amendment Act 2004

Education Act

Habit Forming Drugs Act

Interpretation Act

Magistrates Courts Amendment Act, 1999

Penal Code

Penal Code (Amendment) Act, 2004

Stock Theft (Amendment) Act 1997

Glossary of Terms

NORMATIVE: means any practices, conventions, rules, standards, principles or norms that govern operations in or are followed by a court in relation to a particular process or processes whether these are adhered to as a matter of tradition, formal legal requirement or both. This definition relies on the notion of norms expounded by Gulliver (1963:9) who defined norms to 'include principles, norms, values, rules, laws and the like'

JUDGE: refers to a presiding officer of a court. It is not used in the same fashion as it is employed in the Interpretations Act.

FORMAL JUSTICE: The term 'formal justice' as used here refers to the ability or inclination of a court to adhere to commonly agreed standards as set out in procedural and other sections of statutes governing the trial process as a whole(see Lyons 1973). The question whether the rules that must be followed are consistent with or contradict the court's own notions of justice is not a relevant consideration.

LEGAL FORMALISM: a belief or requirement that the way the legal system conducts business must be based on binding rules and principles, or more narrowly, the injunction that the courts are bound to follow or conduct business according to or within parameters set by rules.

ORDINARY COURTS: refers to received or western style courts also known as general courts.

INDIGENOUS COURTS: means customary courts.

EXTRA-ORDINARY JURISDICTION: in the context of this thesis it means a situation where extra jurisdictional powers have been conferred on customary courts to enable them to try offences that would otherwise be

considered to be outside their competence because of deficits in their substantive powers or some other factor.

UNIFICATION/INTEGRATION OF LAW: the terms are used as loosely as they are in the general literature (especially the writings of A.N Allott) and are not intended to have broader or narrower meaning that in the literature, in this thesis. According to Allott (1984:65) '...unification imposes a uniform law; integration creates a law which brings together, without totally obliterating, laws of different origins....'

ORIENTATION: means a constellation of values, general philosophies, and aims that inform, drive, underlie or associated with a system or subsystem.

FOCAL CONCERN: any problem or issue that is of particular concern to a social/interest group, institution, agency or organ of the state, and which causes that entity to focus attentions and energy on it.

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CHAPTER ONE

1.0 INTRODUCTION

1.1 Background to the Research

It has been over thirty years since the government of Botswana made the most significant legislative intervention yet to minimise the gap between criminal trials in customary and ordinary courts. In 1972, the government passed the Customary Courts (Amendment) Act (1972), which effectively marked the end of customary criminal law, and, heralded the coming into operation of a common offence framework for all the courts, as well as the adoption by customary courts of procedural rules broadly similar to those found in the ordinary courts. These reforms, underlined the importance of the principle on comparability of standards of justice in criminal trials in plural legal systems as established at a series of all-Africa conferences on modernisation of African law, where it was agreed, amongst other things, to resolve the conflict between customary criminal law and received criminal law through the 'unification/integration' of substantive law, and, standardisation of procedural rules (Allot 1984).

As independence approached, the long term aim of narrowing the differences in standards in plural legal systems continent-wide in respect of criminal trials was given new impetus by a desire to de-racialize criminal justice. The pattern in Botswana was not any different:

> "One of the factors reinforcing the goal of creating a completely unified legal system is the objective of maintaining a non-racial ideology. Moving towards the goal encourages dismantling of those aspects of the dual legal system which imply the appropriateness of separate judicial apparatuses for blacks and for others, even though duality is rationalized in terms of culture or life-style instead of race"(Barton *et al* 1983:99).

The adoption of a rights-based constitution probably also changed the dynamic in the criminal justice system. The new Constitution as described in official literature was meant to guide customary courts personnel following the 1972 reforms as 'the basic principles according to which Botswana is governed', which were put in place to 'secure the protection of law for every person' (Republic of Botswana 1971(a):2). This general trend has been underscored over the years by the adoption of international standards for fair trial under various United Nations conventions (see Tshosa 2001).

Yet more than three decades after the momentous reforms of 1972 were introduced, the perception that the criminal justice system in Botswana is characterised by wildly different standards of justice is widespread and persistent (WLSA 1999, Boko 2000, Tshosa 2001, US State Department 2006). Concerns have been raised, locally and internationally regarding the question whether those coming before these courts are subject to broadly similar treatment as was presumably envisaged when reforms to 'unify' criminal law and standardise procedures were undertaken. Inequities and disparities in the criminal justice system supposedly emanating from differences in rules, values, standards and practices of the two legal systems have become one of the most widely discussed topics in the popular press and in the legal community, in recent years.

Much of the criticism in the popular press and in scholarly articles (Kirby 1985, Boko 2000) concerning perceived failures of justice has been directed at customary courts. The independent press has been particularly critical of customary court justice. One newspaper described customary courts as 'a joke' and '... a government sponsored court of injustice that is putting innocent men behind bars' (sic) (Midweek Sun 07/01/2004). Scholars have found customary court justice wanting in a number of ways. They have criticised customary courts for being too quick to convict accused persons

even though the judges that preside over them often lack the necessary skills to take onerous decisions affecting the liberty of ordinary citizens (WLSA 1999: 83, Kirby 1985, Boko 2000). The belief that customary courts convict too readily is not confined to critics of the system but it is something that caused the government some anxiety before and after the changes that were introduced in 1972. The terms of the Baillie survey (1969) on customary courts and the repeated cautions to court presidents in a guidebook prepared for customary court staff in preparation for the 1972 reforms attest to this. For example the guidebook cautioned that: "There are court presidents who feel that they have failed if they do not secure a conviction in a criminal trial" (Republic of Botswana 1971(a):4).

Critics have also suggested that customary court procedures are generally flawed and exclude important elements of a fair trial such as legal representation (Kirby 1985). One of the earliest post-independence studies to be done on the customary system raised concerns about procedure in customary courts (Ballie 1969). The survey, which was commissioned by the government, was tasked, inter alia, with providing a factual account of the practice and procedure in customary courts and to try to assess the standing of these courts in the eyes of a cross section of the public (term of reference (a) and (e) respectively). It found the procedures to be unsatisfactory. Almost a decade and a half later another commentator observed that the police channelled weak cases or cases where the evidence would be inadmissible in magistrate courts, to customary courts (Kirby 1985:32) thus suggesting that procedures in the latter were relatively weak.

Similarly, punishments handed down by customary courts often attract a lot of criticism from the liberal sections of the community for their inappropriateness or harshness. It appears that in some cases it is the underlying attitudes thought to be behind punishments imposed by

customary courts rather than the punishments as such that are the subject of criticism. Customary courts are generally believed to espouse a philosophy of punishment that is fundamentally different from that of the western-style courts (Tagart 1931, Schapera 1938, Leslie 1969, Baillie 1969). These perceived differences have from time to time prompted governments, before and after independence, to pass laws to regulate the use of punishment.

Ordinary courts have not escaped criticism either. The most common complaints against ordinary courts in the media have been in connection with apparent delays in the disposal of cases (e.g. Daily News 29/10/2001). Rural communities and traditional leaders have generally been critical of ordinary courts for being somewhat detached from community values and affording offenders too many protections at the expense of victims of crime. There is evidently no consensus regarding how far apart the two systems are in terms of standards or regarding whether or not the differences between them are of an acceptable magnitude given the presumption of comparability that underpins the system post-1972. The most widely accepted view amongst scholars and the legal community at large is that they are too far apart and that radical reform of the customary system, in particular, is required to bridge the gap (Boko 2000, Tshosa 2001). Among the most widely cited demands in the legal community is that accused persons appearing before customary courts should be allowed legal representation, which is currently not the case.

On the other hand, traditional leaders believe that the role of customary courts should be preserved, if not expanded (House of Chiefs debates on the Stock Theft Bill 1997). Chiefs and other traditional leaders believe that any differences that there are between customary and general courts are necessary and acceptable. Perhaps government has to a certain extent found this argument persuasive in that it has granted customary courts

extraordinary jurisdiction in respect of two major offences (stock-theft and habit-forming drugs) that carry sentences that far exceed the normal sentencing powers of customary court judges. Another argument advanced in support of the role played by customary courts in criminal trials is that they enjoy far greater legitimacy among the general population than the general courts (Otlhogile 1993).

Protections provided for customary law in the Constitution seem to encourage the view that government never intended to go all the way with convergence (see Otlhogile 1993) though some commentators suggested in the period immediately after independence that government was slowly abolishing customary law (Brewer 1974). It is difficult to determine what exactly the position of the government is on the current debate about disparities in the criminal justice system save to note that so far the government has not instituted any further reforms since 1972 to bring the two legal systems even closer in terms of rules and procedures governing the trial process. Large areas pertaining to procedure and evidence in criminal trials in customary courts were left outside the reach of common law rules when the reforms were instituted so that in these areas the trial process is still governed by customary law. The government may have been encouraged in this attitude by various government commissions tasked to look into the law and the workings of the courts such as the Presidential Commission Report of 1979 which observed that despite their shortcomings, customary courts '...dispense a reasonable standard of justice....' to contemplate any further radical changes (Republic of Botswana 1979: 32).

Perhaps the government has more pragmatic reasons for maintaining the status quo. Some have suggested that the role of customary courts in the criminal justice has been retained for reasons of administrative convenience rather than justice because the system is so heavily reliant on these courts

that it can not function without them (Bouman 1984). There is much to suggest that this may be a valid argument. The minister responsible for local government under whose ministry customary courts falls recently observed that customary court play a vital role in dispensing justice (Daily News 18/07/2000). Furthermore, statistics indicate that the majority of criminal cases are processed by customary courts. Figures show that customary courts tried 66% of persons sent to prison in 1985 (Otlhogile 1993:530). Another study showed that in 1992 customary courts dealt with 70% of criminal trials that year (Love and Love 1996:41).

General uneasiness about the system as it is currently arranged amongst sections of the public, the legal community, scholars and international agencies may be an indication that the balance that was struck in 1972 is no longer appropriate for contemporary Botswana society. The country has undergone tremendous structural transformation over the past 40 years or so: whereas she was regarded as one of the poorest countries in the world at independence in 1966, it is today categorised as a middle income country (see Pearce et al 1990, Hope 1996, UNDP 1990). More of its citizens than before are educated, and therefore more aware of their rights. The increasing professionalization of the lower courts in the general system is probably also increasing pressure on the customary legal system to modernize more rapidly and in a sense further converge with the former. These factors may explain current heightened concerns about disparities in the legal system. But given the changes outlined above, the entire national legal system finds that it has to strive hard to find the right balance between the changing lifestyles, social conventions and justice.

Some early writers expressed fears that the nature of duality of the legal system in post-independence Botswana might be creating different classes of citizens with different sets of rights (Barton et al 1983:99). Some have been

more explicit, arguing that in criminal matters, magistrate courts are forums of justice for rich, educated or enlightened defendants whereas customary courts are regarded as forums for poor, illiterate or unenlightened ones (see Kirby 1985:31, Boko 2000:458, Molatlhegi 1997). Some practices, such as the way the transfer of cases from customary to magistrate courts is handled lends credence to this view. For instance, if a defendant wants to get his or her case transferred from a customary to a magistrate court he/she must produce a letter from a lawyer to that effect and that essentially means matters turn on whether he/she can afford a lawyer in the first place as the state does not provide any in non-capital cases, even for the indigent.

In sum, many of the concerns regarding divergences in the normative standards of the two legal systems revolve around trial processes, most notably procedure, and outcomes of these processes, but typically about both of these (Baillie 1969, Kirby 1985, WLSA 1999, Boko 2000). It appears that while the incorporation of what are essentially common law courts procedures into the law governing the trial process in customary courts has narrowed considerably the previously existing gulf between common law courts and customary courts, a significant gap still remains because the latter are exempted from certain rules or are allowed to follow customary procedures in certain areas. Rules that apply in respect of different aspects of the trial process in customary courts were deliberately designed to be similar to or different from those applicable in the general courts to varying degrees. The law also leaves some gaps in some areas regarding certain aspects of the trial process or in relation to structural arrangements presumably to encourage customary courts to follow the traditional pattern of conducting trials. Thus while on the one hand convergence of processes and rules was intended to make justice in indigenous and received courts roughly comparable, on the other hand flexibility clauses/exemption clauses preserve

and perpetuate differences between the two. It is these differences that are the major source of controversy.

This review suggests that critics of the current arrangement tend to feel that variation in the rules relating to different aspects of the trial process affect outcomes of cases. But not all of these differences in rules or process or their impact are measurable or quantifiable. In some cases it may be difficult to separate the impact of a particular rule from that of others. In certain areas such as evidence it may be difficult to determine conclusively whether a lower court has misdirected itself in applying a particular rule (as customary courts are often accused of doing) until the matter goes to higher courts on appeal. It then becomes a technical matter whether in arriving at a particular decision the lower court achieved or failed to achieve the correct balance or the correct result having regard to all the circumstances. In that case the complaint ceases to be about the process but rather becomes one about the rule itself. However, all of these circumstances would not stop members of the public complaining about disparities resulting from differences in the rules or how they are applied by the courts if they intuitively feel that the situation is not consistent with their idea of justice.

This thesis attempts a comparative analysis of the impact of differences in the rules relating to the last stage of the trial process, namely sentencing. Unlike with other stages of the trial process disparities relating to sentencing outcomes are measurable and norms or rules relating to imposition of punishment tend to be very specific in nature.

1.2 Aims of the Thesis

The aim of this thesis is to provide an empirical basis for the national conversation on comparative justice in customary and ordinary courts. It is evident that there is dearth of information on many aspects of the trial

process. Even though comparative justice is a recurrent theme in public and scholarly discourse, remarkably little has been done by way of empirical research on the comparative aspects of the criminal process in ordinary and customary courts. Virtually no research of any significance has been done in the area save for a study conducted by Bouman (1984) more than twenty years ago. This neglect is surprising given the amount of interest that the public has shown in the issue over many years, if the amounts of column inches in newspapers that have been devoted to the subject indirectly or directly and amount of attention issues of comparative justice receive at government-sponsored workshops on the criminal justice machinery are anything to go by. This lacuna is even more surprising considering the fact that not only was criminal law and allied branches of law such as criminal procedure identified very early by modernizers as an area that needed the most urgent attention but it has to date been the subject of the most radical reforms ever seen in Botswana. These reforms have fundamentally altered the dynamics of how the customary and received systems operate and relate to one another and it would be natural to assume that this would pique interest of researchers. The recurrent debate on the comparative merits and demerits of the customary and general courts in this area has been all the poorer for lack of research on the subject.

The present study therefore provides a much needed empirical dimension to the on-going public and scholarly debate on the nature and comparability of justice dispensed by customary and ordinary courts. It helps to close the existing knowledge gap on the subject of comparative justice by focussing on sentencing in customary and magistrate courts. More specifically, it examines the impact of differences in the rules that govern the options exercisable by magistrate and customary court judges in respect of the use of punishments and combinations of punishments (discretion) in relation to a variety offences. More generally, the project provides a starting point as well as a

framework for a policy debate concerning the impact and implications of variations in rules governing sentencing in customary and magistrate courts. Crucially, it links this debate to historical justifications for the integration of criminal law and also locates the discussion within the broader context of principles of modern criminal justice systems in the common law world hence the focus discretion. Sentencing is a particularly topical issue in Botswana at the present time because of changes to the punishment regime brought about by a change in the law in 2004. Lastly, the study proposes new policy and research directions and it is hoped that it provides stimulus as well as the opportunity for reflection on the nature and dynamics of pluralism in the field of criminal law.

1.3 Scope of Study

It may be asked why this project is limited to sentencing. The simple answer is that it would have been impractical to attempt a comparative analysis of all stages of the criminal process in the two types of courts, much less, gather enough data on all of them, in the time available to be able to do justice to each one. Thus while a comprehensive analysis of all the stages of the trial process would have gone a long way towards closing the existing information and knowledge gap more fully, it was simply beyond the scope of the present project. It is for these reasons, and for reasons of limitation of space, that this study focuses on only one stage in the criminal process, in this case, sentencing.

1.4 An Overview of Methods

The present study employed the Mixed Method research strategy which combines quantitative and qualitative methods in a way that is similar yet qualitatively different from traditional triangulation to obtain information on aspects of the criminal process in customary and magistrate courts. In brief, the study gathered data on the following aspects of the criminal process: sentencing outcomes, court staff and courtroom processes. It was

hypothesized that differences in the structure of discretion of judges of customary and magistrate courts as regards punishments or combinations of punishments they may impose for similar offences would result in comparatively dissimilar punishments for those offences. As a first step the study sought to establish whether there were any general patterns as regards the distribution of offences by type of court since it was assumed that apart from differences in substantive jurisdiction, other factors, such as the focal concerns of each system played some role in the distribution. Second, we wanted to find out whether there were any variations in the sentencing patterns of these courts for offences triable-either-way generally. Finally, using an assortment of quantitative techniques the study compared and measured the effects of an identified variation in the discretionary powers of magistrates and customary court judges on sentencing disparities in cases involving offences and offenders with similar characteristics.

A census survey involving a total of 10 024 criminal cases tried before magistrate and customary courts at Kanye and Mochudi over a period a ten years (1991-2001) was the primary method of data extraction. This was followed by a more detailed supplementary survey, which was conducted at Mochudi, focusing on offence and offender characteristics. The supplementary study covered the period 1996-2000.

Court observations and interviews were used to obtain qualitative data which were used to gain further insight into court processes and to gather information on the views and background of agents who drive the trial process, especially judges. The rationale behind court observations was two fold. First, to gather material on court processes, generally, including, sentencing. Second, to gather general background material on court dynamics, not normally available in, or discernable from, court records (e.g. pre-trial and post-trial attempts by presiding officers to reconcile complainants and defendants). In terms of the research design of the study it

was intended to supplement quantitative data gathered using the census survey by providing, in a general sort of way, useful information on the orientation of magistrate and customary courts. In my assessment, such material provides a useful backcloth for the analysis of the main questions of the study.

1.5 Statement of Thesis

This study postulated that differences between the two types of courts in respect of discretion as to choice of punishment would have a significant distorting effect on sentencing such that in any given instance, the probability of an offender suffering or not suffering a particular form or combinations of punishment for an offence that is triable-either-way would be likely to vary with type of forum. As corollary to that and given assumptions that the thesis makes about the value differences between the customary and general courts (see Chapters Three, Four and Five), the severity of punishments that defendants would be likely to suffer would most likely vary by type of court as well. It was hypothesized that these differences would manifest (a) in the form of general patterns and (b) also in more specific patterns in relation to specific offences and offender characteristics.

Because the offences in the penal code, the primary offence-creating instrument in Botswana, are organised, like those of most other countries according to some rough scale of gravity, if the punishment patterns vary significantly distortions are likely to occur in the distribution of severe/lenient sentences within the system as a whole. Thus, the principle common to modern legal systems that the severity of the penalty suggests greater reprobation would be undermined when customary and magistrate courts are compared.

1.6 Hypotheses

The primary hypothesis of the study set out below, summarizes the expected effects of differences in the structure of discretion on sentencing patterns and outcomes. It is followed by a series of minor hypotheses. The first set of hypotheses (1-2A), all of which are non-directional, are concerned with broad patterns and how these may be linked to the orientation, basic values and focal concerns of the two types of court, amongst other factors. Hypotheses 1-2A are described as non-directional because they predict that there will be differences in the patterns of the two types of court without indicating the likely direction of these divergences as in terms of which of the two will have a lower or higher value in respect of any of the items described or enumerated under those hypotheses.

These hypotheses provide a context for understanding the effects on sentencing outcomes of the differences in discretionary powers of the judges of these courts. These effects are summarised under directional hypotheses 3-4. The second set of hypotheses (3-4) may be described as directional in so far as they attempt to make predictions regarding the directional patterns of the expected trends.

The primary hypothesis of this study was that: Differences in the structure of the sentencing discretion of judges of customary and magistrate courts as regards the types and combinations of punishments they may impose in respect of any offence triable in either type of court is likely to result in the imposition of unjustifiably dissimilar punishments for similar offences.

Hypothesis 1: There should generally be an uneven distribution of criminal cases between the courts.

Hypothesis 2: There should generally be variations in the outcome of triable-either-way offences registered for trial in customary courts *viz-a-viz* those registered for trial in Magistrate courts.

Hypothesis 2A: There should generally be variations in both sentencing patterns of customary and magistrate courts in terms of sentencing outcomes for triable- either-way offences and regarding the most frequently deployed punishment(s) by each type of court, overall.

Hypothesis 3: Customary courts are more likely than magistrate courts to use multiple punishments to punish a single offence.

Hypothesis 3A: Where customary courts use multiple punishments to punish a single offence, the punishments are generally likely to differ in severity when weighted and compared with those imposed for the same offence by magistrate courts.

Hypothesis 4: Where the punishments imposed for the same offence is of the same type, the severity of punishments is likely to vary according to type of court regardless of whether or not the offender and offence characteristics are similar.

As is probably evident from most of the hypotheses, the study focused primarily on sentencing outcomes, but more generally on outcomes of cases entering customary and magistrate courts. Justification for this approach was that since the two legal systems are, despite convergence in a number of critical areas, anchored in social and legal cultures with potentially divergent value systems, the sentencing outcomes can only be properly understood and appreciated if *the fate of the average case* that enters the two court systems is known because outcomes of cases are products of case-processing decisions of the courts which may, for whatever reason, be peculiar to that type of court. Case processing decisions were in turn, assumed to a lesser or greater extent, to be indicative of the orientation/values of the court in question. Subject to rules governing the use or importation of principles associated with them, these values would presumably run like a thread through all stages of the criminal process

including, sentencing. To that extent, punishment like other stages must be seen as being, fundamentally, about values.

What, exactly, was assumed to be the relationship between discretion and variations in outcomes or fate of cases, generally? The short answer is that it was assumed that those differences in outcomes of cases that did not reach sentencing stage would have very little to do with sentencing discretion as conceptualised in this study (see Chapter Four) They, were, however, assumed to have a lot to do with other case-processing aspects such as evidence and procedure which might in turn be influenced by variations in discretion between the courts in relation to these processes at that point or stage in the trial as well as the general orientation of the courts. In other words, it was assumed that such outcomes were probably influenced by let out and flexibility clauses specific to that stage of the criminal process.

1.7 Theoretical Considerations

The interdisciplinary nature of the study and its general methodological approach (see Chapter Two) means that the emphasis of the study was more on gaining insights into problem of disparities rather than on providing opportunities for theoretical reflection on justice in plural legal contexts. To that extent the study did not rely on any overarching theoretical framework or a heavy theoretical background to inform or guide analysis and research. However, the study does borrow and use insights from writers who have been associated to varying degrees with theoretical models that are well known in some sub-disciplines that this study draws upon such as legal anthropology. A good example would include those writers in the area of legal anthropology whose works refer to or have been categorised as falling under or utilizing processual and rule-centred approaches to law (see Comaroff and Roberts 1981). Furthermore, where it is considered it would

facilitate discussion to do so, we employ the broader notion of legal pluralism, not as theoretical framework but as a concept.

Legal pluralism is unquestionably the dominant theoretical framework for understanding and analysing law in colonial and postcolonial societies at present time (Woodman 1998, Merry 1988). While it provides a welcome corrective to the epistemic bias in law (see Griffiths.J1986, Merry1988), it does not resolve conceptual problems presented by the hybrid nature of African legal systems (Kuper and Kuper 1965). Furthermore it is open to doubt whether legal pluralism in both the official and theoretical sense is still the appropriate framework for analysing difference given that its cohesiveness and therefore, analytic value, is being increasingly undermined by the emergence of new pluralisms(see Tamanaha 1993;2000, Woodman 1998) and lack of a theoretic closure. It has been suggested that the concept has been extended too far so undermining the comparative project which has always been at the heart of anthropology (Woodman 1998).

It appears to me that legal pluralism in its various forms is useful as a way of illuminating the dynamics of a plural legal environment albeit at a fairly high level of abstraction. It does not, however, provide an adequate theoretical context for the analysis processes and micro-processes within and between delineated and/or self-described (legal) systems, especially in sentencing (see Henham 2000). Notions like 'deep pluralism', 'weak/strong pluralism', 'state law pluralism'(see Woodman 1996; Griffiths.J 1986), whilst useful for analytical purposes at a relatively high level of abstraction, are not much use as a guide for understanding a range of permutations that occur within or might be conceivably be thought to fall under these different labels.

1.8 Structure of Thesis

This thesis is divided eight chapters. *Chapter One* outlines and discusses the context, thesis, scope, assumptions and structure of the study. It also briefly touches on methodological issues. Some of the issues enumerated are given fuller treatment in the subsequent chapters.

Chapter Two discusses the research strategy, the assumptions behind it, as well as the methods and techniques employed in the study to gather and process data. It describes project-specific factors which led to the choice of mixed method research strategy as the methodological approach of the study. It also outlines and discusses procedures used to analyze data.

Chapter Three examines legal developments in Botswana from the colonial period to the present in the context of a dual legal system with a specific focus changing normative emphasis of the legal system.

Chapter Four discusses and describes the framework for the exercise of sentencing discretion in Botswana, before going on to consider the discretionary powers of magistrates and customary court judges in relation to discretion as to combination of punishments.

Chapter Five presents and analyzes results from the quantitative part of the inquiry drawn from the census survey, supplementary survey and derivative data.

Chapter Six presents and discusses results of the study based on observational data.

Chapter Seven presents and discusses results from interviews with key court personnel.

Chapter Eight is the concluding chapter of the study. It summarizes the critical and salient findings of the study in light of the primary hypothesis and other supporting hypotheses. More importantly, it explains the general and specific factors behind variations in the sentencing patterns of customary and magistrate courts. Furthermore, it considers the implications of the study for a number of dimensions of punishment generally, and in the specific context of Botswana, not the least of which include dealing with the complexities of the meaning of punishment in rapidly changing post-colonial societies. It then briefly considers the significance of the methodology employed in the study and identifies areas for further research and possible policy changes.

1.9 Conclusion

This chapter introduced and outlined the thesis and basic structure of the study. It provided the background to the research problem and outlined the hypotheses that form the focus of the thesis. It also briefly considered the scope, justification and the methodology of the study.

CHAPTER TWO

2.0 METHODOLOGY AND RATIONALE

A brief overview of the methodology of the study was provided Chapter One, Chapter Two discusses methodological aspects of the study in greater detail. This chapter is divided into three broad sections. The first section of the chapter discusses the research strategy of the study, its justification and relevance to the present project as well as its philosophical basis. The second part focuses on the methods and techniques used in the process of data collection in both the pilot and the main study. It also discusses the revision of and adjustments to the data collection techniques and strategies that were made following the pilot study. The third and last section provides a synopsis of data analysis techniques employed in the study and their possible limitations. However, for immediacy and ease of reference more detailed description and discussion of data analysis techniques is provided in the relevant sections of the Chapter Five, Six and Seven which present results on different aspects of the study.

2.1 Introduction

The purpose of this study was to examine and compare sentencing practices of two different systems to discover how general or system-specific factors may be influencing sentencing outcomes in customary and magistrate courts. In this study I employed a mixed method research (MMR hereafter) strategy that involved the simultaneous use of quantitative and qualitative techniques but with the former as the primary method guiding the study. The choice of mixed method research design was motivated by, amongst other factors, apparent divergences in the methods that have traditionally been employed in sentencing research into normative aspects of legal systems, especially African legal systems. There appears to be a strong commitment to quantitative and qualitative methods among researchers working in the areas of sentencing and African legal systems and more specifically cross-

systems research in Botswana. As this study straddles the two areas I considered that the mixed method design was the most appropriate design for this research. Incidentally, interest in a MMR is growing across social sciences and behavioural disciplines (Tashakkori and Teddlie 2003). As an approach to research, MMR is descended from traditional triangulation even though it is considered to be qualitatively different from the latter in that it is founded or claims to be founded on a firmer and more coherent philosophy than triangulation (Tashakkori and Teddlie 2003; Cresswell 2003). On another level MMR is also seen as an emergent movement that is motivated by an emphasis on a pragmatic approach to methodological issues. One of its defining features is that it tries to rise above the paradigmatic differences and disagreements between quantitative and qualitative approaches, that have, traditionally, occupied and sometimes even paralysed researchers in the social sciences and related fields. This shift in thinking about research has been characterised by leading advocates of MMR as the Third Methodological Movement (TMM) in contradistinction to the historical evolution and self-referential nature of the two dominant paradigms (Teddlie and Tashakkori 2003). What persuaded me to adopt MMR was the pragmatic nature of its guiding philosophy which dictates that the choice and mix of methods must depend on the question to be answered.

MMR has a number of distinct advantages over traditional approaches to research (Tashakkori and Teddlie 2003). First it can answer research questions that other methods can not answer. Second, MMR by its very nature makes for stronger inferences. Third, it provides the researcher with the opportunity for presenting a greater diversity of views. It has even been suggested that MMR portends a wider methodological movement (TMM) that is in the process of establishing itself (Teddlie and Tashakkori, 2003:4). As indicated earlier, interest in MMR is growing across social sciences as well as in behavioural disciplines. It is growing most rapidly in the health sciences

such as nursing (Forthfer 2003). Its value is also being increasingly recognised and underscored in psychological research, education, sociology and in the field of evaluation (Tashakkori and Teddlie 2003:x). The publication of the handbook on MMR cited above as well as a number of other books on MMR also suggests an increasing interest in the approach (eg Cresswell 2003). Even more important, according to Tashakkori and Teddlie (2003), a number of journals have begun to feature articles on mixed methods may well suggest the emergence of an important trend (Tashakkori and Teddlie 2003: 698).

2.2 Methodological Issues in Sentencing and Cross-systems Research

But before I discuss the specific mixed methods research strategy used in this study, the philosophical basis of mixed methods, and project-specific factors that motivated me to adopt a mixed methods research strategy for the study, it is necessary to discuss what research methods predominate in sentencing and cross-systems research generally, and in Botswana in particular, so as to provide a context for the choice of methods for the study.

Research in the fields of sentencing and cross-systems studies involving western style legal systems and non-western legal systems have traditionally been dominated by quantitative and qualitative methods respectively. Examples of the anthropological genre abound (Schapera 1938; Bohannan 1957; Gulliver 1963). Most studies comparing sentencing patterns of different courts, most of which, in the common law world, have been in advanced industrial societies, are within-system or intra-system studies focusing on such themes as racial and gender disparities in sentencing (Hood 1992, Spohn 2002) sentencing patterns of lower courts versus sentencing patterns of higher courts or geographical variations in sentencing patterns such as urban versus rural (Spohn 2002). Although there are notable exceptions (e.g. Carlen: 1976), it seems that the preferred methods in sentencing research are

in the main quantitative (see Spohn 2002; Tonry 1988). With the possible exception of comparative analysis that superficially examines such phenomena as incarceration rates and victimisation (e.g. Zvekic and Frate 1995) in different countries, cross-systems research that focuses on value-based differences and similarities has traditionally, been dominated by qualitative approaches (Nader 1992, Mundy 2002, Moore 1978;1997).

Because it is mostly concerned with the influence of certain variables relating to various aspects of sentencing, sentencing research tends generally to emphasise quantitative methods. The introduction of software such as Statistical Package for Social Scientists (SPSS) direction (see e.g Field 2005) has probably pushed sentencing research even more in the quantitative. New and increasingly sophisticated software with enormous capacity to handle and analyse large amounts of data has increased the possibilities and scope for statistical manipulation tremendously. This has enabled researchers to, amongst other things, explore, re-analyse and re-interpret old research data on sentencing from past studies. Economists, whose interest in sentencing seems to be growing, have imported mathematical models into the area and this can only increase the perception that quantitative techniques are the natural methods to use in sentencing research. It is therefore not surprising that some have decried the 'blackbox' approach to sentencing research that simply identifies factors that are prima facie determinants of decisions of a particular kind and then abstract them from the sentencing context. The few works that there have been that have focused on interpretive procedures of actors and how they account for their practices have been both insightful and enduring (e.g. Carlen: 1976). Nevertheless, it seems unlikely that there will be a major shift soon in the area of sentencing research in the direction of qualitative methods.

On the other hand, the predominant methods in cross-systems study of western style and non-western legal systems, especially African legal systems, have been of the qualitative variety, the most important of which is ethnography. Researchers have been using ethnographic methods to study legal systems in Africa with great success since the colonial period (Schapera 1938, Radcliffe-Brown 1952, Gluckman 1955, Bohannan 1957). Ethnographers working among the Tswana are among researchers whose works have had a significant impact on the international scene (Schapera 1938; Comaroff and Roberts 1981; Griffiths. A. 1997). But most early researchers, with the exception of Gluckman (1955) did not make a direct comparison between western legal systems and African legal systems. However, that did not stop the debate moving in that direction, particularly in scholarly journals and at international conferences. In more recent times in-depth qualitative analyses of cases across systems in Botswana has been most pronounced in the field of family law (e.g. Comaroff and Roberts 1981; Griffiths. A. 1997). Where there has been any resort to the quantitative format at all among researchers working in that area it would be at the most basic level of representation of absolute numbers in tabular form as a way of summarising data rather than as a preferred tool of analysis as such. Thus studies in the area of family law have remained firmly on the qualitative side of the methodological divide. There have been virtually no cross-system studies of similar magnitude and depth to those in the field of family law in the area of criminal law since independence. This is not to overlook Bouman's (1984) pioneering work, which though limited in depth, makes up for that in that it examines various aspects of trials in customary and magistrate courts.

2.3 Cross-systems study of sentencing: Methodological challenges

It should be evident from the foregoing discussion that any study that proposes to examine and compare sentencing practices in two different

systems to discover how certain variables or factors may be influencing sentencing outcomes must find itself in an unusual position as far as matters of methodology are concerned. The apparently strong commitment to either quantitative or qualitative methods among researchers working in the areas of sentencing and cross-systems research makes the dilemma unusually stark. The range of methods within the two brackets and the possible mix of methods is so wide that it confuses. This is where MMR becomes important because its guiding philosophy is that the choice of methods must be determined by the question to be answered. MMR advocates a pragmatic combination and use of quantitative and qualitative methods for purposes of data gathering, and eschews the 'either/or' approach of traditional methodological purists. In that way it sidesteps epistemological controversies that tend to pre-occupy and divide those who identify strongly with either quantitative or qualitative methods. It is mainly concerned with finding ways of combining qualitative and quantitative methods in a way that best answers the research question. It is MMR's emphasis on the question rather than philosophical arguments surrounding qualitative and quantitative methods that appealed to me.

A number of factors made the flexibility that MMR provides particularly important in this study. First because the nature of the question to be answered in this study required an interdisciplinary perspective, it was always likely that a variety of methods would have to be used to obtain data. Second, following on the previous point, it became obvious as the project developed that it was in fact going to be necessary to employ multiple-methods in the study. In particular since it was clear that the preferred methods in sentencing research especially where the focus is on sentencing disparities are generally those of a quantitative variety. On the other hand since the study was concerned with normative sources of disparities it was also clear that qualitative data was going to be necessary. Because the present

study is a cross-systems study concerned with the impact of convergences and divergences between these systems on justice, it was imperative to understand the normative underpinnings of both systems in order to make sense what the quantitative data would be telling me. I had to use qualitative methods to capture courtroom dynamics and other processes. Moreover, research on the customary legal system, and more recently, research comparing processes and outcomes in the received and indigenous legal system which forms the background material for this study, has been dominated by anthropological methods.

In these circumstances traditional triangulation would not have sufficed as it is more concerned with the validation of findings using different methods rather than with the pragmatic use of multiple methods as such. While, unlike some of the leading proponents of MMR, I would not argue that triangulation as a concept has lost meaning or value, I believe it would not have served our purposes well in this study.

Above mentioned advantages notwithstanding, MMR has a number of theoretical and practical limitations. On a practical level MMR may prove too daunting for many who may wish to use it, for a variety of reasons (Cresswell 2003: 210; Tashakkori and Teddlie 2003). First, it requires the researcher to be competent in both quantitative and qualitative methods, a combination of skills that is rare among researchers in the social sciences as most tend to have a bias towards one or the other of the two methodological orientations. Second, a researcher using MMR may find that MMR requires extensive data collection. Third, the amount of data generated and the variable forms (i.e. text and numeric) that the data takes means that data analysis may take longer than usual.

Whilst justifications for the adoption of MMR based on practical concerns is easy enough to appreciate and understand especially for a project such as the present one, the paradigmatic claims made for MMR or the movement associated with it remain, it must be conceded, shaky. MMR has a long way to go before it can make convincing claims about paradigmatic or philosophical independence from quantitative and qualitative approaches. It is difficult to see how MMR can rise above paradigmatic squabbles between committed quantitative and qualitative methodologists given that MMR does not have independent philosophical roots as it is built around the idea of pragmatic use of already existing methods. It is therefore not surprising that MMR advocates concede that amongst the issues that remain unresolved in MMR, are, nomenclature and definitions used in MMR and issues concerning the paradigmatic foundations of MMR. MMR advocates also recognise that it may be some time before TMM gains wide recognition as movement that has truly shifted thinking in the social and behavioural sciences. However, for most researchers it is the practical rather than the theoretical elements of MMR that matter most, not least because emphasis on practical issues allows them to choose methods appropriate for their research without having to pay homage to quantitative or qualitative philosophical concerns.

2.4 The Strategy for the Study

This study employed a mixed method research strategy known as concurrent-nested strategy (CNS hereafter). CNS is basically a data collection strategy that involves the simultaneous use of quantitative and qualitative techniques whereby one primary method guides the study. CNS has a number of features that distinguish it from other MMR strategies. It is characterized by contemporaneous use of quantitative and qualitative methods but with one method being given priority over the other. This

particular feature distinguishes it from ordinary triangulation. In terms of CNS, the second method may be used to answer a different question from the main method or obtain information from different levels and in that way address issues that could not be dealt with using the dominant method. In this study the primary data collection methods were, as already stated, quantitative while secondary or complimentary methods were qualitative.

Concurrent Nested Strategy has a number of limitations (Cresswell, 2003:218). First, data may be difficult to integrate given that it would take different forms. Second, there may be an imbalance in the quality of the evidence because of different methods used and the imbalance inherent in the strategy itself. The foregoing points notwithstanding, the suitability of any given strategy depends on the nature of questions to be answered and as yet there is no method or combination of methods that does not have shortcomings.

2.4.1 Project-Specific Factors Motivating Choice of CNS strategy

First, one of the main objectives of the project research was to measure and compare the impact of a variation in sentencing rules that appear to have been introduced with the intention of admitting into the sentencing process the peculiarities of the customary legal system. The first part of the question required the use of quantitative techniques, in this case multiple regression, while the second part required the knowledge of the context in which these decisions were made including possible similarities and differences in philosophy and logic that could and should possibly manifest themselves as a result of the variation in the applicable rules. Yet it is also recognised that one of the major barriers that research on western and non-western courts often had to confront was the problem of equivalence of concepts, principles and precepts across the board including whether a particular wrong should or should not be classified as criminal or civil wrong under one or other

system (Schapera 1938:47). It was precisely this kind of problem that, in anthropology, led to the well-known Bohannan-Gluckman controversy that divided researchers (Moore 1997).

Comaroff and Roberts (1981) have argued that a full understanding and appreciation of the logic of the Tswana courts can only be achieved by locating the dispute process within its cultural context. However, in the field of criminal law the influence of rules that would normally apply in customary court cases has been restricted by the unification of substantive law and the introduction of semi-standardised procedures based on common law principles as a consequence of which the dynamic between the social and the legal domain has been transformed in a fundamental way. Yet at the same time exemption clauses and other rule variations that allow value-based differences to manifest and assert themselves have been retained.

Rule standardisation and variation in the current system presents us with new opportunities not available to researchers who might have been interested in comparing the two legal systems before the unification of criminal law and partial standardisation of rules of procedure. In this study, we decided, because of the nature of the rule variation, to look at the variation through the prism of discretion. Other important factors considered were the possible influence of the training and background of key court personnel even though these were only included as background material. The focus on key court personnel was considered important in this study because background training and qualifications of court personnel is one of the constant themes in the public debate about comparative studies in Botswana. Moreover, differences in the skills and competences of court personnel were used as the justification in 1972 for granting customary court judges lesser substantive powers than magistrates. Furthermore, it has been suggested that lay and professional personnel tend to approach cases

differently (Asquith 1983, Damaska 1986) and it follows that differences would be expected to register in at the sentencing stage as well.

2.5 Methods of Data Collection

A combination of quantitative and qualitative methods was used to gather data for the present study. In keeping with the strategy of the study, the bulk of the data was collected using quantitative methods. Data gathering on the quantitative part of the study involved a general census survey of court records of magistrate and customary courts at Kanye and Mochudi and a more detailed survey at Mochudi focusing on certain variables and for selected offences only. Whereas the information for the general census was obtainable from both court registers and court files, the more detailed information was only available in the latter. Qualitative methods employed in the study included court observations, interviews, field notes and examination of a wide range of documents more especially archival material, newspapers, statutes, memoranda to Bills, the Hansard and authoritative anthropological texts.

2.5.1 Quantitative Techniques

Most of the data used in this study was gathered by means of a census of recorded criminal cases going back ten years (1991-2001). The census yielded a total of 10 024 criminal cases tried before magistrate and customary courts at Kanye and Mochudi. Data from the general census was the primary source of data used in the analysis of general patterns. This was data that was gathered contemporaneously with qualitative data.

More detailed data pertaining to offence and offender characteristics was obtained from the main site at Mochudi after the main census had been completed. These data covered the period 1996-2000 and involved 1014 of cases. The data was used to determine to what extent similar offences or

similarly situated offenders received dissimilar sentences from customary and magistrate courts.

Looking at the size of the general census sample it might be thought that it is perhaps too large. However, if considered in context the questions that the study sought to address, then the sample sizes are reasonable. This is a study that examines trends and patterns over an extended period of 10 years. Universal coverage was essential in respect of the general part of the study so that we could be certain that changes in patterns, if any, were not merely temporary effects of known or unknown factors restricted to a particular year or period. Sentencing studies that look at trends over extended periods of time tend to use large samples. This was particularly important because as can be surmised from the number of cases in the second sample (Mochudi 1996-2000) which is a universal sample of selected offences, triable–either way only constitutes a narrow band of offences in the lower middle–to-bottom end of the offence scale. The triable–either way band does not include some fairly common offences (with the exception of drug-related offences and stock-theft) at the top-end of certain offence categories. For instance triable-either way offences in the assault-related and theft-related offence categories do not include grievous bodily harm and armed robbery respectively. In addition to this, the skewed distribution of triable either-way offences between the courts made it necessary for the coverage to extend over a number of years if we were to accumulate enough cases in each offence category to be able to make meaningful comparisons.

(a) *The General Census Survey*

The following information was extracted from the case registers and case records at Kanye and Mochudi for the period 1991-2001: case number; type of case (offence type); status of case (i.e. whether concluded, pending, closed or withdrawn); number of accused persons involved in the case; type of

disposal; type and quantum of punishment(s) (i.e. where the court imposed punishment); name and rank of the officer(s) presiding over the case. In respect of cases handled by customary courts comments of case reviewers and any action taken by the court following the review were noted. Data from the general census was intended to answer non-directional hypotheses 1-2A which postulate that the distribution and punishment of offences triable-either-way would vary by type of court.

(b) *Selected Offences*

More detailed case information than that obtained in the general census was collected at Mochudi, the main site for the study. Data gathering involved universal coverage of selected triable either-way offences belonging to two major offence categories namely: Property Offences and Offences against the Person. In terms of our classification, Property Offences consisted of a range of theft-related offences such as theft common, burglary, stealing from dwelling while Offences against the Person included assaulted–related offences like assault common, actual bodily harm and unlawful wounding.

These offences were selected because a preliminary analysis of the general census survey data indicated that they were the most common triable either-way offences and as such had the potential to yield the relatively large numbers of cases so enable comparisons to be made between magistrate and customary court disposals. From these cases I extracted information on legal (type of offence, prior record, mitigation) and non-legal variables (gender, age, employment status). Information based on legal and non-legal variables was used to address postulations made under directional hypotheses 3-4. These hypotheses postulated that there would be significant variations in sentencing outcomes of magistrate and customary courts in certain specified directions regardless of whether the cases involved were similar or the offenders were similarly situated.

2.5.2 Instruments and Procedures for Collection of Qualitative Data

In this study, qualitative methods were used to gather information regarding organisational set up and dynamics of the courts, the training and background of court personnel as well as the attitude of some of these officers brought into the courtroom regarding sentencing of offenders and the justice system as a whole. As explained below both the selection of cases to be observed and the selection of individual subjects for interview was not done in a rigorous scientific fashion because of certain constrains that I describe in detail below. In any case, it was never intended that the qualitative data should be subject to the same rigours of selection because of the way it was going to be used.

Data gathered using qualitative methods was used primarily to compliment statistical data. More specifically, it was used as a backdrop to the comparative analysis of sentencing patterns of magistrates and customary courts that is based on statistical data. Qualitative data provides a context that bald statistics do not in and of themselves supply and as such it fills an important gap in main data. It provides us with the context, logic or narrative that helps us to make sense of differences/similarities in sentencing patterns of received and indigenous courts. This is achieved, inter alia, by drawing on existing narratives on punishment in Tswana communities in anthropological and other literature, as well as through analysis of information gathered by means of court observations and interviews conducted during field work.

(a) *Interviews: Court Personnel*

One of the recurrent themes in debate on comparative justice was the relative quality and competence of personnel in magistrate and customary courts. Interviews supplied some of the necessary information on these aspects as they provide biographical data on the subjects' and as well as their views on

the competences of colleagues. To understand exercise of sentencing powers by magistrates and chiefs I thought it was important to capture the dynamics of and the general setting in which the decision-making process takes place in magistrate and customary courts. Organisational context here includes both the general orientation of the type of court concerned and the background and training of court personnel that operates it. The focus of the inquiry in this context was on the latter.

A semi-structured interview, directed at key court personnel, was used to obtain data from respondents regarding information enumerated above. The following personnel were interviewed during the study: court clerk (2), interpreters (1) local police (2), Botswana police (2), Assistant Commissioner of Customary Courts (1), member of Customary Court of Appeal (1), customary court presiding officers (3) and magistrates (3).

I decided to include a member of the Customary Court of Appeal and the Assistant Customary Courts Commissioner on the list of interviewees because of information that emerged during fieldwork which led me to believe they would illuminate certain areas of the study. I thought I should interview a member of the Customary Court of Appeal following two Customary Court of Appeal circuit sessions at Kanye and Mochudi which I attended where members of the court of appeal made particularly telling comments about standards of justice in the customary courts. The interview with the Assistant Customary Court Commissioner was intended as a follow up on exchanges between the Customary Courts' Commissioner's office and Chiefs' Courts that I came across in case review notes and in official communication concerning the handling of cases. I had intended to interview the District Commissioner as well but he was not available due to official commitments. I wanted to capture these oversight officers' views on standards of justice in customary courts, and about whether and how they as

appellate and review bodies ensured that principles that they established in their decisions were transmitted down to and followed in customary courts.

(i) Presiding Officers

Even though the Paramount Chief rarely has time to spare for adjudication, we will describe as the Chief's Courts not least because that is how it is perceived by ordinary people. In the villages it is called 'Kwa Kgosing' or the Chief's Court. It is at the centre of village and tribal life. More importantly, despite the chief's absence the Chief's Court continues to fulfil its assigned function.

Initially the category of presiding officers to be interviewed was restricted to Magistrate Grade I and the Paramount Chief. The rationale for this choice was that even though the chief is the highest (if we exclude officers of the Customary Court of Appeal) ranking officer in the customary court system and Magistrate Grade I was the lowest ranking officer in the received system, the gap between them in terms of substantive powers is the smallest that can be found to exist between any two officers from the received and the indigenous legal system. I believed this fact alone should make them more comparable than other cadres, the fact that the powers of Magistrate Grade I far outstrip those of a chief, notwithstanding. I realized during the pilot study that it was not going to be possible to pick only officers from these two ranks/cadres for interviews as I had intended. I found that almost all the magistrates operating the courts at the selected sites belonged to grades other than the ones selected for attention in this study. I encountered a problem of a similar nature in customary courts in that the Paramount Chiefs hardly ever attended court because of other responsibilities. Other senior chiefs such as the Deputy Chief and the Senior Chief's Representatives did very little criminal work and seemed more interested in civil cases which tended to attract larger crowds than criminal trials (with the exception of cases

involving stock theft). As it turned out about 70-90% of criminal cases that were tried before the customary court at Kanye and Mochudi were handled by the chief's representatives. It was for these reasons that I decided that the choice of candidates for interviews would depend on whether such individuals were heavily involved in criminal work rather than on rank as such.

(ii) Chiefs

Paramount Chiefs are not the only administrative heads of their tribes but they are also the highest judicial authorities in their districts and represent their tribes in the House of Chiefs. Because their duties in the House of Chiefs keep them fully engaged most of the time, chiefs hardly have time to discharge their other functions, including judicial functions. As a result, these functions are performed by the Deputy Chiefs and other lower ranking chiefs such as the Senior Chief's Representative and the Chief's Representative.

The Chief's Courts serve as both courts of first instance and courts of appeal for other customary courts within their districts (see section 41(1) Customary Court (Amendment) Act, 2001. Appeals handled by the chiefs' courts may originate from lower customary courts or internally within the Chief's Court itself. Internal appeals are possible because the Chief's Court usually consists of chiefs of different rank with different sentencing powers. Those cases tried by chiefs of a rank lower than the Paramount Chief or Deputy Chief such as the Senior Chief's Representative and the Chiefs Representative are appellable internally; otherwise cases proceed to the Customary Court of Appeal (Section 41(2), Customary Court (Amendment) Act, 2001). Cases from the chief's court are subject to review by the District Commissioner (Section 38, Customary Court (Amendment) Act, 2001) and until recently the Customary Court Commissioner.

(iii) Magistrates

Magistrates preside over what are in effect the lowest courts in the received courts hierarchy. Amongst the general courts, magistrate courts have the greatest reach because they are found in most major centres and generally cover the entire administrative district in which they are located. The magistracy is made up of professionally trained lawyers whose substantive jurisdictions vary according to rank. It is not quite clear when the magistracy became fully professionalized but it probably happened in the 1990s. Before that, senior administrative officers in the District Administration such as the District Commissioner doubled up as magistrates. The Magistrate courts as a forum offers the sort of justice at local level that is generally believed to satisfy internationally recognised minimum standards for a fair trial. Defendants who may not want to be tried before a customary court can apply to the customary court of appeal to have their cases transferred to a magistrate court though this may prove difficult if the person concerned does not have legal representation.

(iv) Court clerks

Even though Court Clerks working in magistrate and customary courts share the nomenclature, 'Court Clerk,' the roles they play in the court processes are quite different.

Court clerks based in magistrate court play a different role as far as criminal trials are concerned from those who work under chiefs in customary courts. Unlike their counterparts in customary courts, court clerks in magistrate courts are not directly involved in trials. Perhaps, understandably, Court Clerks are not transferable between general and customary courts. This section focuses on Court Clerks based in customary courts because they are directly involved and play a more central role in the criminal process than those based in magistrates' courts.

Apart from general functions of an administrative variety that they have to perform, Court Clerks are charged with recording, in long hand, the proceedings of cases that come before customary courts for trial. The notes of Court Clerks form the official record of the case, and it is generally speaking, unusual for chiefs to take notes of their own during proceedings. There is an expectation that under normal circumstances court clerks will guide chiefs if the latter should require some assistance regarding any aspect of the criminal process during the course of a trial. Court Clerks are particularly expected to provide guidance to chiefs or headmen where the latter is not illiterate or semi-literate.

By law clerks (Customary Court (Procedure) Rule 5, Customary Court Act) are supposed to register case charges but in practice the framing of charges is done by the police even though the actual allocation of cases to various presiding officers remains the responsibility of Court Clerks.

(v) *Prosecutors*

Like in other jurisdictions the duty of the prosecutor is to represent the complainant or the state. His/her primary task in a criminal case is to persuade the court to convict the accused person. Botswana Police, the national police force, are responsible for prosecutions in cases that come before magistrate courts, which function they perform on behalf of the Attorney General. They also conduct prosecutions in customary courts. The Local Police, (a rough equivalent of community police), on the other hand are restricted to prosecutions in the customary courts. The Local Police is based in the tribal court complex or urban court complex as the case may be. Even though the Local Police may, and do appear, in Magistrate courts as investigators particularly in those cases that have been transferred from customary courts to the former, they are, however not allowed to prosecute

cases there. Like Court Clerks they are not transferable across the legal systems.

(vi) Interpreters

The role of a Court Interpreter is to translate the proceedings from English into Setswana and vice-versa for the benefit of the accused person, witnesses or the court, in the general courts. When there is no court work, Court Interpreters perform administrative duties. Court Clerks step into the role of Interpreters when the latter are not available for whatever reason. Customary courts do not employ any Interpreters, presumably because the language of the court in these courts is Setswana, and it is therefore assumed parties that take part in trials before such courts would have basic knowledge of the language.

(b) *Court observations*

The purpose of court observations was twofold. First court observations were used to gather material on court processes, including sentencing. Second, they were also used to gather background material on court dynamics not generally available in or discernable from court records such as pre-trial and post-trial reconciliation attempts initiated by the presiding officer. All together, 26 cases were observed live in magistrate and customary courts at different sites during the pilot and the main study. Of these only 21 were usable. Material from court observations was used mainly as background and supplementary material for the study.

Court proceedings were recorded using an audiotape. In all, 20 cases were to be covered in the study. But in the event, more than 26 cases were recorded as precaution against possible loss of data, due perhaps, to damage to tapes or poor quality of the recording in a particular instance. For reasons of

comparability, cases chosen for observation involved mostly those offences that were triable in both types of courts during the pilot stage that was the main guiding criterion. For the main study however a further criterion was added to the existing one, namely that offences involved had to be either Property Offences or Offences Against the Person. These offence categories are described in one of the preceding sections above. These offence categories themselves included a range of offences of varying degrees of gravity. Offences Against the Person consisted of assault-related offences such as common assault, unlawful wounding, and actual bodily harm, grievous bodily having and associated attempts. Property Offences encompassed theft-related offences which included: theft common, housebreaking with a theft element, burglary with a theft element, stock theft and associated attempts. The rationale for selection is discussed in preceding sections of this chapter.

(c) *Interaction Schedule:*

An Interaction Schedule was provisionally included in the pilot study for purposes of capturing other aspects of the court hearings. More specifically, it was intended to record in summary form the exchanges between the participants in a case and the content of those exchanges. However, it was to be dropped from the main study when it appeared to distract from other aspects of the cases under observation. That indeed turned out to be the case, and it was accordingly abandoned.

(d) *Field Notes*:

Apart from the material generated directly from individual cases, detailed notes were used as a supplementary source of data on various aspects of the trial process such as non-verbal behaviour. Occurrences that I thought might add an interesting dimension to the research or those that raised matters I wanted to make a follow up on in the interviews were noted in a field

notebook. I paid particular attention to, amongst other things, the court set up, procedures and courtroom interaction. This method was essentially meant to compliment tape recordings by helping me to reflect on the main concepts, themes and issues as well as to facilitate coding. This strategy was also intended to enable the researcher to find patterns in the data. Where it seemed appropriate and necessary to do so, official recorders' reports/notes were used to supplement audio materials and notes. Observations made during the course of trials informed some of the questions that were later put to key court personnel during interviews.

In the case of customary courts, case review notes contained in the case files that I came across as I was collecting material for the quantitative part of the study proved a rich source of information on customary courts. Information from case review notes was recorded as part of field notes. Case review information was very useful in providing insights into the review process and more importantly, the dynamic between reviewers and the chiefs. A number of useful insights were gained from case review notes. It became clear from some of the comments and exchanges between the reviewers and customary court judges that the relationship between them was characterized by uneasiness if not outright hostility in some cases. Interviews with chiefs at Kanye and Mochudi confirmed the impression that they were unhappy about having their cases reviewed by government officers outside traditional court hierarchies such as District Commissioners and the Customary Courts Commissioner's office. Even more important, information on reviews revealed differences between chiefs and government bureaucrats about how severely certain types of cases should be punished. Resistance from chiefs also meant that sometimes decisions of reviewing officers were not implemented. More generally, it means that attempts to shape patterns of punishing in customary courts through review decisions, was thwarted or severely undermined.

It is difficult to say whether the study captured all the reviews for all cases recorded because some of this information was written on loose pieces of paper some which might have fallen out of the files at some point or other and might therefore not have been available to be recorded. It appeared that there was no consistency in the way review comments and related communications were archived by the courts. However, this shortcoming did not diminish the value of the review information for purposes of this project.

2.5.3 Documents and texts:

A range of documents, including official communications, newspaper cuttings , statutes and texts which I considered to be of some relevance as regards any of various aspects of the legal system which fall to be discussed were collected for later analysis and reference. Some of these documents were retrieved from the National Archives.

2.6 Selection of Research Sites

Initially, five sites were selected for the study as a whole (i.e. the pilot plus the main study), two of these sites being urban (Lobatse and Gaborone) and the rest rural/peri-urban sites (Molepolole, Mochudi and Kanye). One of the rural/peri-urban sites was included as backup (Molepolole). Both magistrate and customary courts were to be covered at each of the sites.

Ideally, two sites should have been adequate for the study but I considered that an expanded list afforded me some measure of flexibility should problems requiring a change of site occur while I was still in the field. Moreover, I felt it was essential to have a list of sites large enough to choose from to avoid having to re-apply for the research permit if it turned out that a particular site proved, for whatever reason, to be unsuitable for the study.

The rationale for selecting sites in urban and peri-urban areas was that I felt that the rural-urban divide represented to a greater or lesser extent, differences in social organisation and other dynamics. I sought to find out how the tension between the modern and the customary expresses itself in these two very different environments. As I explain elsewhere in this chapter, other considerations came into play during the course of the study which altered my thinking somewhat regarding the question whether the rural/urban dimension was really necessary.

The choice of the places named above was dictated to a large extent by pragmatic reasons, not the least of which were distance from my base (Gaborone) and availability of financial resources and time. Out of ten potential sites, 5 were chosen and 3 (Kanye, Mochudi and Lobatse) were actually used in the study. Sites were pre-specified (in the proposal) for purposes of securing a permit for the study. Researchers are required, when applying for a permit, to name in advance the areas they propose to cover in their study. Despite these constraints, I considered, for reasons described elsewhere, that the sites selected, suited the research problem as it was then framed.

(a) *The Pilot*

It was originally intended that the pilot would cover only one site. Since the emphasis in the proposal was on the development of instruments and data collection techniques, this seemed like a good idea at first. However, when other factors were taken into consideration, it soon became clear that one site would not be adequate even for this purpose. The most important of these included the opportunity to test the instruments and the data gathering techniques in urban and peri-urban settings. It would have defeated the purpose and logic of the pilot if it had excluded either type of site. Moreover,

the interview schedule that I took with me to the field had sections that applied exclusively to urban customary courts. Information relating to this particular aspect of the study would not have been recorded and reflected upon prior to the main study if the urban sites had been left out altogether.

Kanye and Lobatse, which are 40 kilometres apart, representing peri-urban and urban sites respectively, were chosen as pilot study sites. Mochudi and Gaborone, also 40 kilometres apart and also representing the peri-urban/urban split were reserved for the main study.

(b) The Main Study

It was originally intended that the main study would be conducted in Gaborone and Mochudi, however, I was forced to drop Gaborone altogether from the main study due in large part to the instability caused by staff movements at the various magistrate courts in the city. It will be recalled that the focal point of court observations was intended to be decision-making patterns of particular Presiding officers in respect of a selected class of offences across a given number cases. As such a stable environment was necessary in relation to personnel and handling of the selected offences.

After being assigned about five different officers in succession over a period of two months, I realized that I had little choice but to drop Gaborone from the study. As regards staff movement, I found that those on some kind of staff leave or those who would be leaving the public service shortly or those whose contracts were up for renewal, sometimes decided not to try cases which they had been assigned or any fresh matters. These, therefore, often floated from one officer to another.

Internal practices did not help matters either. Officers, often, understandably, transferred fresh cases to other officers if they had emergences or if they could not, for whatever reason, try those matters. Furthermore, the relevant cases were often spread between different officers so that it would take a long stretch of time before s/he could accumulate the requisite number of cases. Yet another factor was that, unlike in the rural areas, a significant number of cases in Gaborone were defended and this tended to cause delays and postponements as the courts tried to synchronize their diaries with those of defence lawyers. Withdrawals were also common, due in part, to the backlogs and delays (police sometimes lost contact with witnesses).

Dropping Gaborone from the study meant that I had to reconsider the value of the urban/peri-urban split. Accordingly, over 5 000 cases collected in Lobatse courts in the course of the census survey were not included in the data set used in this study. However, the interviews with court personnel were retained as part of the qualitative data. This essentially meant I was left with two rural or peri-urban sites of Kanye and Mochudi with the latter as the site for the main study. While general census data was collected from both of these sites, the majority of court observations data and the more detailed part of the study which focused on legal and non-legal variables were done in Mochudi.

2.7 Post-Pilot Study Reviews

2.7.1 Instruments:

The interview schedule proved quite effective in eliciting some useful information from the respondents. However some questions were not clear and were accordingly revised. At least one question proved not to be that useful. The Interaction Schedule was also dropped because it had become redundant. First, it was rather cumbersome and too complex. Second, I found it difficult to use because I had at the same time to operate the audio-

recording machine. Third, its inclusion had been, as I stated in the proposal, provisional.

2.7.2 Court Observations:

Being aware that it is difficult for the researchers to be unobtrusive when doing court observations, I initially used a micro-recorder to try to minimise the impact of my presence in court on the behaviour of actors involved in the trial process. But the micro-recorder could not produce usable data and had therefore to be replaced with other more visible equipment.

2.8 Generalizability of Results of the Study

At a general level the practices of the Chiefs Courts may be taken to reflect those of other customary courts of similar level, and more broadly, of the customary courts as a form.

Generalizability: Chiefs Courts

Apart from the Ngwaketse and Kgatla tribal communities covered in this study there are altogether six other groups within the Tswana ethno-linguistic community that have courts of roughly similar jurisdiction (see Schapera 1938;1970). Kanye and Mochudi are the tribal capitals of Bangwaketse and Bakgatla respectively. These communities belong to the so-called major tribes. As a unit the Tswana constitute the majority of Botswana's population. Even though there may be variations in local practices of these tribes it was expected that these would be minor. It will be recalled that the procedural rules that are applicable in customary courts are partially standardised so that to a substantial degree they are similar to those that apply in general courts, there will be those rules (written) that apply to customary courts only (Customary Court Procedure Rule 19 (f)) and there will be those areas where customary law rules and principles (unwritten) apply (S 29 Customary Courts Act). Some of the rules in the second set of rules (i.e. written rules applicable to customary courts but not

general courts) attempt to capture and formalise traditional Tswana practice and procedure. The third set of rules (unwritten customary rules) was expected to be broadly similar across the board though some regional differences of a minor variety could be expected. These groups have been regarded as being so similar in their philosophical approach to disputes, in social organisation and cultural patterns that in discussing certain practices and patterns researchers/writers dispense with the usual group names and use instead the generic term for the compound group: the Tswana. Such usage is evident in Comaroff and Roberts' (1981) discussion of the logic dispute among the Tswana in Rules and Processes as well as Schapera's (1938) discussion of punishment in Tswana communities. This would seem to suggest amongst other things, that customary court judges may be seen as belonging to the same interpretive community. These factors would tend to make the results of this study generalizeable to courts of a similar type around the country.

Customary Courts: General

Organisational patterns of the Tswana, including those of smaller communities outside the territories of the eight tribal communities referred to above, are similar. Today the Kgotla as a form exists in most communities, including the non-Tswana communities. Even some sections of formerly acephalous groups such as Basarwa (San) have, where such groups have assumed a sedentary lifestyle, seemingly embraced it or been encouraged to do so by the government. It has emerged in urban centres in the form of urban (customary) courts though its role as the centre of community life is much more circumscribed in urban environment. So the Kgotla has become a near universal mechanism for community organisation and dispute resolution in Botswana even though in some communities it is a borrowed form and in those instances perhaps much more likely to be more of a juridico-administrative adjunct of the state than in those places where it has

always existed. While those customary courts that have been transplanted to a new environment may be different from those forged in the natural habitat, they are expected to perform similar functions to a greater or lesser degree and are governed by similar rules so that some of the practices of courts covered by this study are probably generalizeable to all customary courts.

Like customary courts, magistrate courts are governed by uniform procedures and are operated by personnel with similar training: professional lawyers. The patterns emerging from the study may be seen (without discounting the role of individual judges) as representing those of magistrate courts in general.

2.9 Limitations of Methods

Problem of offence distribution:

A major problem that became evident in both phases of the study was that it seemed that cases triable in both types of courts were, at some of the sites concentrated in either the magistrate or customary court, suggesting that prosecuting authorities tend to send certain types of cases to one type of court rather than the other. Alternatively, it might well be that offenders who commit particular types of offences in certain localities prefer to be tried in a particular type of court. In theory offenders have a choice regarding where they may be tried but in practice they may not be aware that such a choice is available to them or they may in some cases be prevented by authorities from exercising it. I observed one such instance at Kanye though it was not one of the cases I was recording. Because of these factors, amongst others , it was not always easy in the second (main) phase of the project to find cases, within a suitable time frame, that fell within the bracket of offence types already selected (i.e. theft-related and assault-related offences).

Court Observations

Following the failure of the micro-recorder I had secured for use in court observations to produce audio material of usable quality I was forced to use highly visible recording equipment for recording purposes. It is conceivable that the actors adjusted their behaviour in response to the presence of the highly visible recording equipment, at least in the early stages of the observation exercise. Even though I do not know the extent to which the presence of recording equipment in court during trial affected courtroom behaviour, some actors did show interest in it.

Court Records

Even though customary court records exclude researcher influence on the content, they are far from being problem free. Detailed as they often are, they are nevertheless a very selective rendition of the trial process. They actually mask a lot regarding some procedural aspects of the trial. Another major draw back, is that they do not show as clearly as live cases do, the processes of control that underpin courtroom discourses. Clerks and other recorders, including magistrates, are selective about what they record. For a study such as the present one in which courtroom processes are an important ingredient these omissions are significant and only live cases can close the gap. Furthermore, court records do not reveal post-trial processes such as attempts by the presiding officers to reconcile the disputants.

Documents and texts

A general point that could be made about the use of documentary sources, including transcribed material was that lack of space often makes it necessary to make use of extracts to illustrate a particular point. The reader is, in consequence, denied the opportunity to form an independent opinion regarding the context of the extract.

2.10 Data Analysis Procedures and Limitations

This section summarises data analysis techniques used in the study. More detailed description of these techniques is provided in the relevant sections of chapter 5 for immediacy and ease of reference. The SPSS software used was for quantitative data analysis. The analysis section of the study attempts to answer questions posed by the primary hypothesis and the minor hypotheses on three levels.

Level 1: The first level of analysis focused on general trends pertaining to the nature and distribution of offences by type of court generally; the distribution of offences triable-either-way; how the courts punish generally; how they punish offences triable-either-way and more specifically how they punish two major categories of selected offences triable-either-way . The latter, broadly defined as Property Offences and Offences Against the Person, included a range of theft-related offences such as theft common, burglary, stealing from dwelling and assault –related offences like assault common, actual bodily harm, unlawful wounding etc, respectively. The rationale was to get a general picture of the nature of offences that the two types of courts deal with on a daily basis and the punishments they award so that we could see in what ways the punishment patterns fit in with the ranking system of offences in the Penal Code (the primary source of criminal law). I also focused specifically on the distribution of offences triable-either-way in order to confirm or disconfirm postulations in the non-directional hypotheses 1-2A which suggest that distribution and punishment of offences triable-either-way will vary by type of court. Simple descriptive statistics such as tables were used to display and determine patterns.

Level 2: Having considered aggregated values in relation to Property Offences and Offences Against the Person at Level 1, I then proceeded to disaggregate these values according to individual offences which made up

these broad categories and analysed punishment patterns in relation to these offences. Level 3: I considered the use of various punishments individually and in combinations

Level 3: Last a multivariate analysis of certain factors defined in this study as legal and non-legal variables in order to determine whether and/or to what degree they affected the nature and severity/leniency of the punishment imposed by magistrate and customary court judges. Following Martin and Stimpson (1997/98) legal variables were broadly defined as those variables that refer to or constitute the offence type and such other elements as the law requires must be considered when a sentence is passed such as prior conviction, aggravating factors and mitigating factors while non-legal variables on the other hand were defined as demographic elements or variables such as age or gender. In order to determine the extent to which cases were similar or dissimilar I looked for features defined briefly above as legal and non-legal variables. But in choosing these I wanted variables or elements that were;

a) Common to all cases e.g. age
b) Reasonably discrete and therefore measurable
c) Known to or believed to be good predictors of sentencing outcomes

The object of Level 3 analysis was to see whether if we controlled for certain variables or conversely we took into account certain variables, there would be a significant variations in sentencing outcomes of magistrate and customary courts as postulated in hypotheses 3-4. Further, we wanted to find out whether these disparities (if any) would be of such a nature or magnitude as to significantly distort the ranking of punishments.

Analysis of Qualitative Data

While the quantitative elements of the study provide us with statistical data and measurements that form the basis for comparison of sentencing patterns of the two types of court, bald statistics do not in and of themselves explain much. Data gathered using qualitative methods was intended to fill in that gap. It provides us with the context, logic or narrative that helps us to make sense of differences/similarities in sentencing patterns of received and indigenous courts. This project provides the background to the study by drawing on existing narratives on punishment in Tswana communities in anthropological and other literature as well as through analysis of information gathered by means of court observations and interviews during field work.

Literature

The value-based differences that exemption and flexibility clauses were intended to allow expression of can only be fully understood in the context of established practices of the courts. This is where ethnographic literature becomes important (see Chapter Three). However literature only provides a starting point in the analysis because our interest lies not so much in how received and indigenous legal systems might have operated in their purest form (in the past) as in the underlying philosophy associated with their differing approaches. This should be useful in explaining, if not simply making sense of differences in sentencing and punishment patterns especially where a variation in rules was ostensibly designed to allow customary courts to be different by following (theoretically), traditional patterns of punishing. As suggested in the preceding sections of this chapter and in the introductory chapter the ethnographic literature, taken together with the presumptions behind exemption/flexibility clauses in the law appear to argue for the assumption that despite structural convergence of the courts towards the top, and a common offence framework (Penal Code),

customary and magistrate courts have fundamentally different underlying philosophies. The central issue here is whether it could reasonably be argued, having regard to all the circumstances, that the presumed value-based differences are in anyway implicated or manifest themselves in the sentencing patterns of magistrate and customary courts.

Court observations and interviews

Although anthropological literature may provide us with narratives about punishment in traditional Tswana communities, it can not fully explain current trends as so much of what is happening may, to a certain degree, have been conditioned and shaped my more recent events such as changes in the law and social dynamics of these communities. It was necessary to make up for that shortcoming by gathering more up-to–date information on magistrate and customary courts. Court observations and interviews were used in this study for precisely that purpose.

Court observations afforded me the opportunity to appreciate differences in the atmosphere of and approach to cases in the two types of court. I was also able to capture and gain insights into pre-trial and post-trial processes such as interventions by presiding officer to reconcile the disputing parties.

Interviews were designed to elicit information about the training, experience and educational background of the informants. The rationale was that this would give us an idea about the professional/lay ideologies ('ideal norms') and concerning justice respondents might be bringing into the court and would also help us make sense of the way cases were conducted. For purposes of analysis information gathered from the court observations and the interviews was broken in a manner consistent with the indicative and emerging themes of the study so that some impression, however limited,

could be garnered about organisational set up and dynamics of the trial courts.

Limitations

Measurement of general patterns of sentencing based on the two broadly defined offence-categories was very useful as a first step in the comparative exercise. There were, however, some factors which it is considered hampered the exercise and to that extent may be regarded as limitations. The first problem revolved around offences involving more than one offender. To facilitate computation of results I chose the most serious outcome. For instance, if there were three offenders involved in a case and if accused number one was discharged and accused number two was sentenced to three months imprisonment, it was the latter sentence that would be chosen for inclusion in the tables. This was done uniformly regardless of offence category or type of court involved so as not to cause imbalances in the figures. However, such cases were very few compared to offences involving only one offender. Second, if case involved more than one offence it was not selected for fear it might distort the figures even if the offence involved belonged to the two selected categories. Third, data was missing for Kanye and Mochudi magistrate courts for years 1992 and 1993 and 1993 and 2001 respectively. It is considered that the missing data did not affect the averages and overall patterns. Besides, if we exclude all the missing years the patterns still remain the same (see Chapter Five).

2.11 Conclusion

This chapter considered methodological aspects of the study. It reviewed and discussed traditional approaches to cross systems research and it found that the most appropriate method for this study would be one that combined

mainly quantitative techniques with elements of qualitative methods otherwise known as the mixed method.

CHAPTER THREE

3.0 THE CHANGING NORMATIVE CONTEXT OF DUALISM

In Chapter One it was observed that the convergence of legal systems system in Botswana was intended primarily to bring about changes in the normative practices of the courts. At the same time, it was noted that existing differences between the two systems produced disparities that have become the subject of continuing debate in the country hence the present thesis. This Chapter discusses legal developments in Botswana before and after independence. It considers the normative context/ thrust of the colonial and post-colonial dualism. In that context, it discusses general factors and orienting values that give, or are generally thought to give, pre-independence and post-independence dualism their character. It focuses on the apparently different imperatives that drove the legal system as a whole and the two systems individually, at different stages in their evolution.

3.1 The Emergence of the State in Botswana

In 1885, Sir Charles Warren declared Botswana a British protectorate, thereby, securing what was then considered, from the British point of view, a strategic corridor to the north, from possible occupation by the Germans or the Boers (Stevens 1967). The declaration of a protectorate over what, henceforth, became known as the Bechuanaland Protectorate brought together, under one administration, various entities that had previously existed as independent polities. It was envisaged that the running of the country would be handed over to the British South Africa Company. After that idea was abandoned, it was for a long time thought that the territory would eventually become part of South Africa. However, determined opposition from chiefs to incorporation into South Africa ensured that the territory remained free to take its own path to independence which finally came in 1966.

3.2 Colonial Legal Dualism: The Specific Context of its Emergence in Botswana

It was not until 1891 that the British government established formal structures, headed by a High Commissioner, to administer the territory. The High Commissioner had the power to:

> "amongst other things, from time to time by proclamation, provide for the administration of justice, the raising of revenue, and generally for the peace, order and good government of all persons within the limits of this order, including the prohibition and punishment of acts tending to disturb the peace"(Order in Council of May 1891).

Even so, no elaborate administrative structures were set up in the territory as it appeared it might be costly to set up structures in what was essentially regarded as a vast, but thinly populated desert territory whose strategic significance derived purely from the geopolitical manoeuvres of the Germans and the Boers rather than its economic value as such. Most writers believe that this explains why the British chose from the very beginning to rely on existing indigenous structures and institutions such as chiefly rule to help them control the new territory despite their misgivings about the latter.

Under the doctrine of Indirect Rule customary law operated, at least initially, more or less undisturbed by general law in the tribal reserves. It must be said though that this arrangement suited both the colonial administration and the chiefs. As far as the British were concerned the arrangement meant that the costs of running the territory were kept at a minimum while for the chiefs it provided a comfort blanket in so far as it seemed to reassure them that they would continue to govern their people much as before with little interference from the state. This arrangement was to endure for many decades before

some attempt was made to wrest some of the powers from chiefs (see for example *Khama and Another v the High Commissioner 1936HCTLR9*).

Shortly after the authority to legislate had been conferred upon him, the High Commissioner used his powers to legislate for the establishment of the legal system (Proclamations of the 10th June 1891). As noted earlier, the absence of state structures with the same reach as the indigenous system meant that structures such as the customary courts not only continued to operate pretty much as before, but would, where necessary be pressed directly into the service of the state policy as it happened when poll tax was introduced. Apparently recognising the value of these institutions, the Colonial Office enjoined the High Commissioner to respect native law and custom as long as it did not interfere with the 'exercise of His Majesty's power and jurisdiction' or was not 'repugnant to morality, humanity or natural justice, or injurious to the welfare of natives' (S.I (2) Bechuanaland Native Courts Proclamations 1942).

In the event, colonial authorities found that they did not have to create new structures to deal with disputes among indigenous peoples because the Tswana judicial system was already so sophisticated that it obviated the need to do so (Roberts 1972:16). When the official legal system was finally set up, (see Otlhogile 1994) existing customary structures were allowed to operate alongside the former until reforms were instituted in the 1930s that required all customary courts to be recognised by the state. Indigenous courts were concerned with the application of customary law in respect of Africans but could administer such general law as they were instructed or authorised by the High Commissioner and/or his subordinates to administration (African Courts Proclamation 1961 S 11(b), (c), (d) and S12).

In policy terms this arrangement meant was that people living in the territory at the time were put into fixed categories in terms of which they fell under the jurisdiction of one system or the other. The received courts (western style courts) were primarily concerned with administration of justice for the European population whilst African courts only dealt with matters which affected the indigenous population.

Access of Africans to the received courts was restricted. As far as matters involving Africans only were concerned, it was left to the discretion of the clerk of court and judge in Subordinate Courts and High Court respectively to decide whether the court could entertain such matters. However, if a matter involving an African, (usually a Chief) was considered important to the peace and order of the territory it could be tried in the general courts of one variety or another. However, Africans were not considered bearers of rights like settlers so that being tried in a western style forum did not mean that they enjoyed the same protections as Europeans during the course of the trial (*Khama and Another v the High Commissioner 1936 HCTLR9; Rv Earl of Crewe Ex parte Sekgome (1910) 2KB 576*). No African court was allowed to try an European, and any Chief who tried to do so was severely punished or removed from his position. For instance, Tshekedi Khama of the Bangwato was tried and punished by an ad hoc tribunal for trying a certain Mckintosh in his court at Serowe (Crowder 1988). African courts were not even allowed to try cases in which a non-African was a witness (African Courts Proclamation 1961 S. 9) In the case of *Toperdo Mookodi v Ngwaketse Kgotla (1968-70 B.L.R. 293)* a conviction was overturned precisely on this ground.

Thus under indirect rule, dualism was understood to mean that customary and general courts were charged mainly with the application of customary and European law respectively. Theoretically, indirect rule as a philosophy did not seek to reshape African socio-political and legal institutions after the

European model but rather sought to keep them separate and distinct. This apparent separation probably fostered the notion of a 'dual'/parallel legal system that was articulated by colonial administrators in official communication. Colonial rule in Botswana in its early years seemed to follow the classic pattern envisaged by indirect rule theorists like Lugard.

Having said that, western law was undoubtedly the dominant legal form during colonial rule. Power was mediated through received law because it purported to settle the question of sovereignty and the relationship between the two legal systems (*Rv Earl of Crewe ex prate Sekgome*). It is clear that the legal order as a whole was constituted by external or imposed law.

Even though the High Commissioner was directed to respect native law and custom such recognition was conditional: customary law was recognised only to the extent that it did not interfere with the 'exercise of His Majesty's power and jurisdiction' or was not 'repugnant to morality, humanity or natural justice, or injurious to the welfare of natives'(S I (2) Bechuanaland Native Courts Proclamations 1942). Customary law was not regarded as law or part of 'The law of The Territory' which was defined as 'the common law and statute law from time to time in force in the Territory but does not include Tswana Law and Custom'(African Courts Proclamation (ACP) 1961). As the legislating authority the High Commissioner had the power to 'recognize or establish in the Territory such African Courts as he thinks fit' (ACP 1961) including the power to define jurisdiction. Furthermore, he reserved the right to 'suspend, cancel or vary' (ACP 1961) the warrant.

Despite the policy of 'non-interference' with native law, the High Commissioner responsible for the territory reserved the right, according to *Khama and Another v The High Commissioner*, to alter customary law as he saw fit. Clearly those who had the authority of 'The Law of The Territory' behind

them wielded more power than those who exercised power within the customary domain. The ostensible separation of legal systems was, to a certain extent, designed in such a way as to preserve these power dynamics.

This asymmetrical relationship was also racialized so that in effect it translated into super-ordinate/subordinate relations between blacks and whites and this was reflected in the master/servants ordinances and other statutes borrowed from The Cape. Any chief who failed to appreciate this soon came to grief as Tshekedi Khama of the Bangwato did when he tried a certain Mckintosh in his court (Crowder 1988, Wylie 1990).

After the Second World War the Colonial Office embarked upon a different type of reform: it began to lay out plans for the eventual integration of the two legal systems. According to some writers this reflected a shift in the power matrix as colonial authorities tried to accommodate an expanding educated African elite. As the independence movement began to gain momentum there were further reforms many of which were based on principles agreed at various conferences on modernisation of customary law. Thus the nature of dualism changed once again.

From the 1950s onwards, there was an inexorable movement towards standardisation of procedures and unification or integration (Allott, 1984: 65) of criminal law in Anglophone Africa despite official/policy commitment to preserve the indigenous legal system/law. Piece meal reforms introduced at the instance of the colonial administration and ideas and recommendations of the wider reform movement connected with a series of conferences on the modernisation of African law were incorporated into procedures that customary courts were expected to follow even though it was not mandatory, at that point to do so.

3.3 Post-Colonial Dualism

Like elsewhere in Anglophone Africa, post-colonial dualism in Botswana grew out of and was animated by attempts to overcome the institutional legacy of colonial dualism which was shaped by the specific requirements of colonial rule (see Aguda1973, Barton *et al* 1983). A number of significant developments occurred in respect of both the substance of law and the overall environment in which the legal system operated that fundamentally altered both the dynamic and underlying values of the system as a whole. These included, amongst other developments, the adoption of a new constitution the results of which were the de-racialization of the legal system and the installation of a new charter of citizens' rights in the form of the Bill of Rights.

The evolution and development of post-colonial dualism in Botswana followed the basic model of legal reform that had been suggested at the series of conferences on modernisation of African law (Allott 1984, Bennet and Vermeulen 1980). It was proposed that with respect to civil matters, customary law and received/state law should be allowed to exist side by side. The application of substantive customary law in such areas was to remain largely a matter for the customary courts. It was also decided that in the case of criminal law, 'unification'/ 'integration' should be the route to take. As a result of the latter recommendation many countries opted to abolish customary criminal law altogether and introduce a universal code instead.

In keeping this general trend the government promulgated, the Courts (Amendment) Act (1972) effectively led to the suppression of customary criminal law and the predominance of a universal code. The Courts (Amendment) Act (1972) included the so-called written law requirement which essentially meant that it was no longer permissible to charge anyone

with a criminal offence unless such an offence was contained in any written law. The new rule was categorical: 'No person shall be charged with a criminal offence unless such an offence is created by the Penal Code or some other written law' Customary (Amendment Act) 1972.

This in effect made the Penal Code (1964) the principal source of criminal law. 'Unification' of substantive criminal law marked a historic shift in the complex relationship between the customary and the general legal system in Botswana. It may be seen as a milestone for several reasons. First, it represented an important stage in the modernisation of customary law and the implementation of a principle articulated at various international conferences on the future of customary law (Allot 1984, Bennet and Vermeulen 1980).

Second, it brought to an end complete dualism that had characterised the legal system in Botswana since the early days of colonial rule. Under indirect rule dualism was understood to mean that customary and general courts were charged with the application of customary and European law respectively. With the unification of criminal law both customary and general courts applied the same law. Third, following from the previous point, it effectively meant the abolition or suppression of customary criminal law, which was an unprecedented step. Fourth, the use of customary courts to enforce the new substantive criminal law and the introduction of standardised procedural rules to regulate the conduct of cases in this area of law meant essentially that the customary system was being grafted into the received system. The system has been in place for about three decades now.

As far as criminal matters are concerned it would appear reforms intended to unify/integrate criminal law were prompted by and reflected the long term aim of narrowing the differences in standards of the two legal systems in respect of criminal trials. In Botswana's case the high point of the reforms

intended to bring about convergence in the practices of the customary and the received legal system was the promulgation of the Customary Courts (Amendment) Act, 1972. All these processes were conditioned and shaped by the Constitution. The Constitution of Botswana, which is the fundamental law of the land, not only guarantees citizens and non-citizens living within Botswana's borders certain rights but also provides the basic framework and broad normative parameters within which all courts must operate. Accordingly as normative standards changed, the Constitution became the primary instrument determining whether certain forms of punishment would continue to be used or not (*Clover Petrus & Another v The State 1984 BLR 14*).

3.3.1 Divergences in Trial Process

The CCA and Customary Court Procedure Rules provide the framework for the trial process in the customary courts. The normative framework is centred on three distinct but related approaches built into the Act and the Customary Court Procedure Rules. First, rules that apply to different aspects of the trial process in customary courts were deliberately designed to be similar to or different from those applicable in the general courts to varying degrees, presumably, with some value or benefit in mind. These form the bedrock of the framework. Second, the law leaves some gaps in some areas regarding certain aspects of the process or in relation to structural arrangements in the expectation that the traditional way of doing things will come into play.

(a) Procedure and Evidence

Apart from the unification or integration of substantive law, one of the most profound changes to the customary courts system was the introduction of customary court procedure rules (see Customary Court Act). The rules were first introduced in skeletal form during the colonial period but the version

published under statutory instrument No 74 of 1971 which was expected to be observed in criminal trials under the 1972 Act, was more detailed than any previous version. More importantly unlike under the previous regime these rules now had 'the force of law' (Republic of Botswana 1971(a):2). These rules not only partially standardised rules governing procedure and evidence in customary courts but also brought them broadly into line with principles and standards observed in the general courts.

Customary courts were required, in a departure from customary practice, to strictly adhere to the rules of procedure and to that end S. 14A of the 1972 Act provided that 'No customary court shall impose upon any person any punishment unless and until a criminal trial has been held in accordance with the provision of the Customary Courts (Procedure) Rules, 1971' (Customary Court (Amendment) Act, 1972). This point was similarly stressed in the guidelines for chiefs and court clerks which also stated that the procedures ' must be carefully complied with at all times' (Republic of Botswana 1971(a):2). The incorporation of what are essentially common law courts procedures into the law governing the trial process in customary courts narrowed considerably the previously existing gulf between common law courts and customary courts.

Even though some of the basic elements of criminal procedure and evidence governing trial processes in customary and magistrate courts are similar, they were enacted under separate and different statutes: the CCA and the Criminal Procedure and Evidence Act respectively (See the Constitution of Botswana and the Magistrate Court Act (MCA)). The two statutes vary greatly in breadth, depth and the extent to which, if at all, laws from outside the self-described legal system (i.e. customary or received) are applicable in that system in the areas of procedure and evidence.

Thus, very large differences remain between these courts in the areas of criminal procedure and evidence despite the significant convergence referred to and described above. Perhaps, one seemingly superficial but ultimately significant difference is that whereas the approach of magistrate courts to evidence and procedure is governed and circumscribed by written and clearly ascertainable rules and principles, the rules applicable in the customary courts (outside the written rules of procedure), are known only to the particular court (it may be accurate to say in some cases the particular judge) and the tribal community in that particular locality.

These differences appear to be the result of a deliberate attempt by the legislature to preserve certain aspects of customary law in these areas by leaving them outside the scope of new rules or simply making provision in various enactments that require that a particular aspect of the trial process to be governed by customary law. Two clear examples of such provisions are S. 29 and S. 49 of the CCA.

Section 29 of the CCA provides that: 'subject to such rules as may be made under section 48 the practice and procedure of a customary court shall be regulated in accordance with customary law'.

To that extent customary courts procedure is, apart from elements regulated by the common law-based customary procedure rules, governed by customary law. This, in terms of the law, will remain the case unless the Minister of Local Government under whose authority customary courts fall, makes rules allowing them to follow practices of the ordinary courts such as those contained in the Criminal Procedure and Evidence Act. None have been made so far.

In a similar vein S. 49 of the CCA provides that:' except where the context otherwise requires, the provisions of any other law in force in Botswana relating to evidence or procedure in civil or criminal proceedings of customary court shall not have any application to the proceedings of a customary court or to proceedings transferred to a magistrate court under section 36, to revisory proceedings in a magistrate court under section 38 or appellate proceedings therein under section 41'.

Similarly, S 31 of the CCA extends the prohibition of legal representation in criminal cases tried in Customary Courts to 'any Magistrates Courts in any criminal proceedings or in any civil proceedings which fall to be determined by customary law'.

Even though large areas of procedure and evidence are governed by customary law the general courts have the ultimate say regarding what is or not acceptable. While the general view that customary law approaches matters of evidence in a way that is different from those of the general courts was confirmed in *Maswikiti v Maswikiti* (1974-1975 BLR57) there nevertheless are broad parameters within which all courts including customary courts must operate. For instance in relation to evidence the High Court held in *Tlhokomelo and another* v *State* (1981) BLR 272 that:

> "A customary Court may only take cognisance of evidence that is relevant, which it finds credible, and which does not offend against the principles which must commonly apply in all courts where the same criminal laws are administered".

Thus, the general courts police even those areas where customary courts have been given considerably leeway to apply customary law. Having said that, procedure and evidence remain some of the most controversial aspects of criminal trials in customary courts and the point of significant divergence

between them and magistrate courts in spite of the considerable convergence brought about by incorporation into customary procedure of rules similar to one degree or another, to those applicable in the ordinary courts. Despite the accepted virtue of simplicity that customary law brings to matters of procedure and evidence in those areas where it has been given some leeway, it is still regarded as arbitrary and difficult to ascertain.

(b) *Sentencing*

Following a transitional period (1964-1972) in which customary courts continued to apply customary criminal and while ordinary courts applied the Penal Code it was considered that it was necessary to bring punishments in the two systems more into line with each other. To that end the Customary Courts (Act) was amended. The Customary Courts (Amendment) Bill 1971 was primarily intended, according to the memorandum to the bill 'to limit the offences for which a customary court may impose a sentence of corporal punishment' (Republic of Botswana 1971(b)). The amendment was meant to ensure, amongst other things, that customary courts could only sentence offenders to corporal punishment in those cases for which the offenders could be sentenced to corporal punishment by a magistrate.

These realignments made it possible for all the recognised courts to begin to operate according to broadly similar principles and within the overall framework created by the Constitution. In regard to punishment the Constitution provides, amongst other things that: 'No person shall be convicted of a criminal offence unless the offence is defined and the penalty therefore prescribed in written law' (the only exception being contempt) (Section 10(8) of the Constitution of Botswana). Accordingly offence-creating sections of the Penal Code and other statutes generally prescribe appropriate punishment for those offences. Where there is no penalty provided for the offence charged, the court must turn to section 33 of the Penal Code, a

general punishment section, wherein the court is directed to impose a sentence of not more than 2 years or a fine or both.

3.4 Colonial and Post-colonial Dualism As Constructs in Official Policy

The popular view among scholars implicitly regards dualism as evidence of difference (Barton *et al* 1983). Formal pluralism has traditionally been represented as constituting, amongst other things, the state's response to the problem intractable of cultural differences, which are assumed to translate into differences in legal cultures (Barton *et al* 1983, Hooker 1975, Mamdani1996). This assumption is rarely questioned in most of the literature and this has tended to confuse the debate about the nature of the difference with the debate about the objects of policy on dualism. Traditional accounts on dualism suggest that it emerged as a pragmatic response to shortage of personnel needed to administer newly acquired territories when the Scramble for Africa was at its height based on a philosophy that recognised cultural differences between those subject to the different systems (Mamdani 1996). It appears from this that in policy terms differences between the legal systems have almost always been taken as a given. Yet the meaning of those differences has tended to change with shifts in political power and policy-ends sometimes radically so (see Kuper and Kuper 1965:15). Post-colonial dualism in Anglophone Africa grew out of and was animated by attempts to overcome the institutional legacy of colonial dualism which was shaped by the specific requirements of colonial rule. According to Mamdani (1996) colonial dualism practiced under the umbrella of indirect rule was mainly about political control of the colonized.

After independence, two basic varieties of dualism emerged: namely one that represented an impulse to de-racialize and detribalize institutions through homogenization and replacement (Mamdani 1996:7) or one that sought to de-racialize without fully detribalizing (see Allot 1965). Botswana followed the latter route. The shift of policy immediately before and after independence to

a non-racial but still ethnically-and-lifestyle-based system of legal pluralism shows that explanations of dualism based on culture alone are not adequate.

To that extent it is probably misleading to regard dualism as evidence of, in a straightforward sort of way, difference. In the hands of the state, difference has always been and continues to be both the subject and instrument of policy in service of a variety of stated and un-stated goals. Notwithstanding the preceding observations legal dualism implied official recognition of alternative notions of justice, an idea promoted by anthropologists who were often engaged as advisors to the administrators on indigenous law in various British territories. Early anthropologists generally emphasised the relativist nature of justice particularly in respect of substantive justice (Dembour: 1996: 21).

To that extent it is probably misleading to regard dualism as evidence of, in a straightforward sort of way, difference. I would therefore argue that in the hands of the state, difference has always been and continues to be both the subject and instrument of policy in service of a variety of stated and un-stated goals.

3.5 The Normative Implications of Post-colonial Dualism

Among early anthropologists the most widely held view was that imposed and received legal systems operated in parallel to one another with very little interaction between them, hence the notion of dualism(see Hooker1975 Schapera1938) Later theorists have cast doubt on this(Snyder 1981 Griffiths J 1986). With respect to Botswana, later researchers have shown that the nature of the relationship between the transplanted and indigenous legal systems in post-independence period, is, at least in the field of family, neither as watertight as the notion of dualism (Griffiths. A1983; 1997, Molokomme1991, WLSA1999)

Griffiths A (1983) has raised doubts about the notion of dualism as commonly applied to customary and general courts in so far as it is used to suggest separateness or insularity of the two systems from one another. Contrary to the idea of separateness conveyed by the concept of dualism, she argues that there is cross-fertilisation of legal orders. Even more significantly, Griffiths argues elsewhere that the results of her study amongst one of the Tswana groups in southern Botswana," undermines any theoretical distinction drawn between Western and customary" (Griffiths 1997:2).

This would appear to raise fundamental questions about those areas such as criminal law where there has been deliberate policy to converge the two systems. As we have noted before, the general relationship between customary and received law in Botswana is not uniform across different areas of substantive law. It seems more starkly so if we contrast civil law with criminal law. The attitude adopted by the state with regard to civil law amounts to what has been referred to as 'deep pluralism'. Deep pluralism, has been described as, 'the state of affairs in which a category of social relations is within the fields of operation of two or more bodies of legal norms.'(Woodman 1996:157). In other words state law and customary law are allowed to exist side by side. The application of substantive customary law in such areas remains largely a matter for the customary courts. But in the area of criminal law, the state has always limited the scope of independence of customary courts. Since 1964 the penal code has not only been the law of general application in criminal matters but it also has (along with a few other sources) been the primary source of legally recognised and enforceable criminal law in Botswana thus producing what Woodman (1996) has described as 'state law pluralism.' Thus in this case we have duality of the courts without duality of substantive law, differences in procedural rules notwithstanding.

3.6 Codified Law and the Dispute Process in Traditional Settings

There is a general consensus amongst writers that reconciliation and maintenance of harmony are important aspects of the Tswana dispute process (Schapera 1938,Roberts 1971(b);1972 Comaroff and Roberts 1981) Comaroff and Roberts(1981) have suggested that the dispute resolution pattern in the Tswana legal system is based on negotiation-mediation-adjudication model regardless of the type of court involved in the dispute resolution process. This means the system as a whole was oriented towards amicable settlement of disputes inside and outside formal structures both as a goal and a process value. They have observed in that regard that:

> " ..In all circumstances settlement-directed activity is said to be an ideal and appropriate response to situations of conflict" (Comaroff and Roberts 1981: 107).

Evidently, in the traditional Tswana set up, the way disputes were handled when they broke out ensured, as far as possible, that mechanisms outside the regular courts played their part in any attempts at settling the dispute. Thus attempts at dispute settlement could be played out in a variety of situations and contexts, both formal and informal. According to Schapera, not only did non-regular courts play a vital role in most civil wrongs but they actually settled a significant proportion of such cases. These courts included family group courts, regimental courts and women's courts. But the dispute resolution mechanism/process extended beyond these informal structures to include direct party-to-party negotiations, mediation and negotiation involving a third party such as a neutral third person known to both parties, a trusted relative of both disputants, non-neutral family groups or a headman. As might be expected, informal contexts tended to be more flexible than formal structures in matters of procedure. Under the traditional set up, disputes entered the formal stage only when they could not be settled by the

informal structures. According to Schapera this was a mandatory part of procedure in the dispute process involving civil wrongs. He observed that:

> "When a civil wrong has been committed, the first legal duty of the parties concerned is to attempt a settlement of the matter out of court" Schapera (1938: 283).

By contrast, Comaroff and Roberts suggest that the settlement-directed nature of the dispute process was not restricted to any specific category of legal wrongs in that way (Comaroff and Roberts 1981:107). In their view the basic model of negotiation-mediation-adjudication was the generally preferred approach regardless of the type of court involved in the dispute resolution process. Comaroff and Roberts (1981) have suggested that the relationship between law and society in the Tswana society, which they believe is different from that observed between western law and western society, affects the way in which the law operates more closely. They suggest that Tswana law is less differentiated from other norms in the social universe than western law, a factor that necessarily influences how rules operate in relation to other processes or ordinary transactions. It is a system constructed around social relations especially relations among kin and the face-to-face nature of the society and disputes are therefore fundamentally about the state of social relations. Disputes are about trying to restore, reconfigure those social relations and so that how a dispute was framed depended on the state of social relations between disputants. Thus in such a context disputes were structured by daily social intercourse in a way that is hardly conceivable for western law.

In direct contradiction to the model described above Schapera (1938:285) has suggested that under Tswana law cases involving criminal wrongs were not negotiable. According to him, in such cases "there can be no attempt to settle the matter out of court" (Schapera 1938:285). But this is not the whole picture.

First, offences that Schapera identifies as being non-negotiable only constituted a small number of legal wrongs. It was by no means exhaustive of all wrongs especially because it did not include of lower level legal wrongs which are now classified as criminal wrongs under the Penal Code but whose classification under Tswana law could be ambiguous. Schapera himself recognized the difficulties of classifying legal wrongs under Tswana system, a problem often encountered when using western conceptual tools to describe aspects of non-western systems. Thus he was aware of the limitations of the classification scheme based on the civil/criminal wrong dichotomy. He conceded in one of his books that the Tswana, "distinguish in practice, though not in terminology, between what we call "crimes" and "civil disputes" (Schapera 1938).

It was probably because of classification problems that Schapera resorted to different labels for criminal and civil wrongs in different publications. In his seminal work, A Handbook of Tswana Law and Custom, Schapera used Civil/Criminal Wrong classification he uses Civil/Criminal in way that broadly corresponds with the Delict/Penal Offence split as used in his other writings. But the former classification system did not seem to overcome the problems of ambiguity hence some subsequent writers have modified it. Schapera used the term "delicts" to refer to those types of wrongs where the offender might be ordered to pay compensation to the wronged party, or where s/he might be punished, and or be required to pay compensation and still be subjected to punishment (Schapera 1943: 32). On the other hand he considered "penal offences" to be those wrongs which were dealt with purely by punishment without any resort to compensation (Schapera 1943: 32). But the dividing line between these categories was often not as clear-cut as it would seem at first glance. Kuper (1969:38) argued, for instance, that sanctions were not a reliable guide for the classification legal wrongs. Instead he replaced Schapera's Delicts and Penal Offences with Private Delicts and

Public Delicts respectively. The latter classification is based on Radcliffe-Brown's schema from which Kuper suspects Schapera derived his own system in the first place (Kuper 1969:38). Writing slightly later Roberts (1972:109-111) retained Schapera's scheme, though he too was not satisfied with it. It has also been observed that in some cases it may not be clear from a fact situation what the nature of the proceeding would be(Schapera 1938, Roberts1972). It has been suggested that in such instances how the dispute is framed depends on the aggrieved party and/or the other disputant (Roberts 1972:110). Comaroff and Roberts (1981: Chapters 3, 4 and 7) have suggested that the very nature of dispute is contested or contestable, at least in some cases. Sometimes the nature of the case may become clear only after it has concluded though this may not be true in every instance. The process leading to and the determination of the nature of the dispute may by implication be negotiable. Such a process may in turn result in a negotiable or non-negotiable legal wrong. So legal wrongs under Tswana law could not all be unambiguously classified as criminal wrongs or civil wrongs as Schapera seemed to suggest because the boundaries of these classes of wrongs were not always coterminous with those of western law. These problems suggest that the general scheme of Tswana dispute process may not fit neatly into the western conceptual scheme.

3.7 Summary

The present system preserves to a considerable degree the duality of the previous system. However there are also a number of significant differences between the colonial and post-colonial duality. First, individuals are allowed to choose whether they want their affairs to be regulated by customary law or Common law regardless of race. Second, all individuals enjoy protection under the bill of rights on the one hand but so does the customary legal system. This has effectively created potential for a clash between the two legal systems over the rights of the individual.

The post-independence state's approach to customary law remains within traditional mould even though it differs somewhat from that of the colonial state. The traditional approach tends to associate law with cultural identity. Greenhouse (1998) correctly argues that such an approach in fact makes law a priori, a symbol of cultural identity. In terms of this formulation law follows the fault lines of culture hence modern/customary dichotomy.

There is consensus in the literature that fundamental differences exist between the customary and the general system regarding process-values and end-values of the dispute processes and of dispute processing mechanisms. More, importantly for our purposes, literature suggests that in the context of Botswana there were historically some deep-seated differences in the way western style legal system and the customary legal system classified and punished many wrongs.

3.8 Conclusion

In this chapter we considered legal developments in Botswana since emergence of a modern state and the advent of legal dualism. There has been a change of a most fundamental nature as regards the values that underpin the whole system particularly the general courts: from a racially-based system animated by administrative justice to one based on democratic values and modern legal principles.

Thus theoretically access to courts is no longer restricted, at least not on the basis of race, and equality before the law is one of the guiding principles of the system. For the customary courts the most profound change has been shift to criminal wrongs based on English common law with its emphasis on written law and easily ascertainable procedures.

CHAPTER FOUR

4.0 CONTEXT: SENTENCING DISCRETION AND DISPARITY

The previous Chapter considered the emergence of dualism of the law and courts and the changing normative context in which the courts had to operate before and after Botswana's independence. The present Chapter describes and discusses the sentencing discretion of judges in Botswana and the general framework that guides the exercise of such powers. More specifically, it considers the discretionary powers of magistrates and customary court presidents in relation to sentencing.

4.1 Introduction

Discretion: Its Various Meanings

The margins or scope of discretion and the context within which it is exercised vary enormously from one situation to another. Thus the concept of discretion carries a variety of meanings. One of the more useful definitions has been proffered by Vidal who describes discretion as: 'on the one hand, the freedom enjoyed by a legal body to make decisions when choosing between different options; and, on the other hand, the fact that this freedom is not absolute but is, on the contrary, defined by a certain legal framework' (L.I Vidal www.udg.es/dretprivat/filosofia/PonenciesII/Isabel Lifante.rtf).

Discretion may take two basic forms. The first type or sense of discretion represents a situation where actors exercise perfect, absolute or near absolute discretion because they determine to one degree or another, the standards that will apply to situations (undefined standards). In terms of the second sense of discretion actors must act within certain limits defined by clear and ascertainable rules (pre-defined standards) and principles. These situations fall within the two of Dworkin's (Dworkin 1977) well-known three sub-species of discretion namely (a) situation where the decision of the actor is regarded as final and non-reviewable (b) where the decision amounts to

interpreting a particular standard before applying it; (c)where the actor or agency creates his/her/its own standards. Dworkin describes the first two as constituting discretion in the weak sense and last one in the strong sense (Galligan 1986).

By way of example and to continue with the theme of freedom suggested in the definition proffered by Vidal, it is clear that discretion may involve a situation where freedom to choose a particular course is restricted or more positively freedom to choose a course of action without constraint (absence of pre-defined standards) (L.Iidal ww.udg.es/dretprivat/filosofia/Ponencies II/Isabel Lifante.rtf). While it might be thought that prescribing standards limits discretion as judges are generally accustomed to believe, some analysts do not see standards as necessarily antithetical to discretion (Galligan 1986:16-17). They take the view that, even where the freedom of action of the decision-maker is severely constrained, mere interpretation of standards constitutes discretion (Galligan 1986).

Clearly, discretion as a concept does not lend itself to analytical precision and is attended by controversy. Part of the problem is that there is a tendency among analysts to define certain situations as constituting discretion and others as not, and then using the parameters of the definition proffered to structure arguments about discretion.

4.2 Sentencing Discretion

Sentencing discretion derives from and is an aspect of the widely used notion of judicial discretion (Galligan 1986, Dworkin 1977, Ashworth 1995). The latter encompasses discretion across all areas of judicial competence in the decision-making processes of courts whilst the former refers to discretion at sentencing stage. Sentencing discretion is, therefore, a subspecies of judicial discretion that is exercisable in relation to sentencing.

Most of the leading writers on sentencing do not put forward a specific definition of discretion or sentencing discretion despite its centrality to the debate on sentencing reform over the past three decades or so (Tonry 1996). It would appear that most take it as given, while others generally prefer to discuss it in the context of the specific sentencing framework of the jurisdiction under discussion (Tonry 1996; Spohn 2002;) Still it is worth mentioning that in sentencing matters judges may have discretion in relation to: (1) the aim of sentence in respect of a particular offence, class of offences, or type of offender(s) (2) quantum of punishment that may be suffered by the offender (3) choice of punishment or disposal. Generally speaking, the scope of discretion of a judge varies by jurisdiction (substantive or territorial); rank of presiding officer or by type of court.

Much of the debate around sentencing discretion among reformers, legislators, the judiciary as well as many of those interested in sentencing research issues tends to proceed from the assumption that interference with the sentencing discretion of judges is likely to affect sentencing practices and patterns of disagreements regarding the direction of change. It is interesting to consider the relationship between the debate on sentencing discretion and the wider jurisprudential debate about judicial discretion. The starting point of jurisprudential debate on judicial discretion is curiously at odds with that of the debate on sentencing discretion. In jurisprudence, the starting point is whether and in what ways judges exercise discretion and on these points opinions vary (Dworkin 1977). In contrast the debate on sentencing discretion does not revolve around the question whether judges do exercise discretion but is rather more concerned with the scope or margin of discretion (Tony 1996, Spohn 2002).

It is necessary for our purposes to provide a rough definition of discretion to guide our discussion. In the context of this thesis sentencing discretion refers

to the decision making powers reserved for and exercisable by the judge regarding sentencing of convicted offenders. Under this definition discretionary powers include the decision whether to impose penalties at all once the offender has been convicted and any decision regarding the type or types of punishments the offender will suffer upon conviction as well as the severity or otherwise of such/those punishment(s). In terms of S19 (1) of the Customary (Amendment) Act 1997 and S32 (1) of the Penal Code, a court may, having regard to certain stipulated facts or factors, discharge an offender without punishing him/her.

Discretionary powers may include the articulation of the aims of the sentence where the primary sentencing aims are not stated in statute as is the case in Botswana. Exceptions include the treatment of juveniles under the Children's Act. Even though this definition has some flaws, it is nevertheless a useful guide for the discussion that follows. I have deliberately given the definition a bias that allows us to discuss the situation in Botswana without having to refine it (too often). The scope of discretion in Botswana is, as we shall see, quite wide and to that extent the definition I have provided encompasses most elements that are broadly associated with the concept as it is understood and used in other jurisdictions.

4.2.1 Trends in Control and Management of Discretion

Legislatures in the common law world, including Botswana, appear increasingly to regard structuring sentencing discretion as the most immediate and effective way of changing sentencing patterns, sentencing practices, and more broadly sentencing policy (Tonry 1996, Ashworth 1995). A notable trend over the past three decades or so has been that legislative enactments in different jurisdictions that have had a bearing on sentencing discretion have tended to be designed mostly to restrict rather than extend judicial discretion. This trend, which represents the most important

paradigm shift to have occurred in recent times in respect of sentencing matters generally and judicial discretion in particular, began in advanced English-speaking countries in the 1970's (Tonry 1996, Ashworth 1995).

As rehabilitation, which had hitherto been the dominant philosophy in sentencing, began to lose its appeal as the main aim of sentencing, the assumptions that underpinned the sentencing structure associated with it inevitably came in for criticism (Frankel 1972/2004, Tonry 1996). When rehabilitation held sway, the judiciary, together with penal institutions were given wide powers to tailor punishment to the 'treatment needs' of each offender resulting in what reformers regarded as an unjust system. For instance, in the United States of America, the rehabilitation ideology was linked with the notion of indeterminate sentencing (Tonry 1996). Critics of the system from both the left and the right called for restructuring of judicial discretion.

Throughout the 1980's and 1990's there were numerous legislative interventions in the common law world to re-shape judicial discretion amidst much opposition from judges. In England and Wales the Criminal Justice Act 1991 was regarded as a milestone in sentencing reform in the past century even though it was not nearly as radical as similar legislation passed in the U.S in general and in states like Minnesota in particular (see Ashworth 1992(a), Henham 1996). Readiness of legislators regularly to intervene to reshape sentencing policy and to restrict the sentencing powers of judges in recent decades contrasts sharply with the legislative abstention for much of the 20th century. Legislative abstention is believed by some to have led to the attitude among the judiciary that sentencing policy is the province of judges rather than the legislature (Ashworth 1995).

4.2.2 Sentencing Discretion: The Botswana Model

The approach to controlling judicial discretion in Botswana is different from that of various U.S jurisdictions, but similar instead, to that of England and Wales. The approach in England and Wales is that the legislature sets high maxima and that allows the judges to award what they consider to be the appropriate sentence in the circumstances (Ashworth 1995). The system places great reliance upon guideline judgements of the Court of Appeal which, in the England and Wales have helped create a tariff system (Ashworth 1983). In Botswana's case the general courts follow the lead of the higher courts which may take the form of appeal or supervisory review. Customary courts are presumed to follow their own patterns of sentencing but are subject to appeal and supervisory (administrative) review. But the general courts may not impose their way of doing things on customary courts. Still they do define the broad normative parameters for all courts including customary courts (*Tlhokomelo and another* v *State* BLR272)

4.2.3 Reasons for Adjustment of discretion: Aims/Objectives

Alteration or re-adjustment of judicial discretion may be done in pursuit of a variety of objectives ranging from overtly political goals (Cavadino and Dignan 2003 Chapters 1 and 4) to those supposedly strictly concerned with sentencing principles (Frankel 1972/2004). From the narrow perspective of sentencing, restriction of the sentencing discretion of judges is usually done with the aim of, amongst other things, increasing consistency in sentencing, reducing or increasing severity of sentences for particular offences, reducing or extending the menu of possible disposals and increasingly, in many jurisdictions, to achieve a deterrent effect in respect of a particular offence (Tonry 1992, Nsereko 1999). Quite often one or more of these objectives is given primacy perhaps with only secondary importance given to the others if applicable.

4.2.4 Evidence of Effectiveness of Adjusting of Discretion

The question whether the modification of the discretionary powers of judges is effective depends entirely on what the objectives of the exercise were in the first place. These may range from ideologically motivated belief that wide discretion is in and of itself a bad thing to be very specific but limited goals such as containing prison populations, reducing discretion or deterring offenders from committing specific offences (see Ashworth 1995). Alteration of discretion may also have unintended effects which may be or may not be easily measurable but which may nevertheless affect the original goal of reform in ways that are not readily noticeable or quantifiable.

Major reform initiatives in the developed common law countries in the post-1970s period appeared to target unstructured discretion following the disenchantment with rehabilitation as the controlling aim of sentencing when it failed to produce the expected results (Frankel 1972/2004, Tonry 1996). As already noted critics associated rehabilitation with widely varying and unfair sentences. A leading critic described the relatively wide discretion that characterised sentencing during this period as indicating 'lawlessness in sentencing' (Frankel 1972/2004). These factors probably encouraged the view that curtailing discretion curbs disparity.

4.2.5 Sentencing Commissions

Post-reform impact evaluation research literature is surprisingly thin despite the vast amount of literature on sentencing reforms generally (Tonry, 1996: 31). Most of the available research is from the United States of America. A number of factors make it difficult to generalise from this research. One of the most important of these is that the objectives, scope and emphasis of the reforms which are the subject of evaluation research vary from one U.S state to the next, making comparison difficult.

However, giving an overall assessment of the impact of guidelines designed by sentencing commissions in the United States of America, Tonry concluded that such guidelines had 'changed sentencing patterns, reduced disparities, ameliorated gender and differences and helped states control their prison populations' (Tonry 1996:32). Spohn made broadly similar observations and conclusions with respect to disparities generally including racial and gender after comprehensive review of evaluation research in these areas (Spohn 2002 Chapters 4, 5 and 6). In another paper Tonry claimed that evidence existed that showed that modification of structure of discretion could increase consistency, reduce disparity and change sentencing outcomes substantially (Tonry 1988: 269). But the two authors also suggest that racial and gender disparities have not been satisfactorily dealt with or eliminated and that changes in the various areas offer, on closer scrutiny, a more complex picture than appears at face value suggesting that evidence on some of the areas is less conclusive than is imagined (Ashworth 1983).

4.2.6 Guideline judgements

Appellate reviews offer the judiciary an opportunity to regulate themselves through guideline judgements passed by higher courts. The little evaluation research that there has been in the U.S.A on appellate review in states without detailed standards showed that the effectiveness of appellate reviews in those states is constrained by ad hoc nature of appellate decisions and the fact that such decisions tend generally to deal with extreme cases (Tonry 1996:188-189). Similar doubts, though not necessarily supported with research evidence, have been raised about appellate review in England and Wales (Ashworth 1992(a); 2004). The same arguments should apply with equal force to the Botswana context because the system operates on the same basic premises.

4.2.7 Mandatory Minimum Sentences

Mandatory minimum legislation by definition imposes the most severe limitations on the powers of judges to decide cases according to their own judgement and in that regard lies at the extreme end of the discretion continuum. However, mandatory minimum legislation has, despite determined opposition from the judiciary, been growing in volume in most common law countries in recent decades (Tonry 1992). Yet it appears, perhaps primarily because of its iniquitous nature to have attracted more difficulties with compliance within agents of the criminal justice than other legislative formulae (see e.g Bjerk 2005). In some jurisdiction it has also been shown to have failed to achieve the goal likely to be associated with or use as justification for such legalisation: deterrence (Nsereko 1999, Lowenthal 1993).

4.3 The Nature of Disparity

As a concept, disparity carries a variety of meanings and that some writers claim that on its own disparity is an empty word (Galligan 1986, Tonry 1996: 186). Disparity is often used to denote unjustified disparity, and in the context of sentencing, disparity has been used broadly to refer to unjustified, or more narrowly, unjust differences in sentences imposed by the court on similarly situated offenders for a similar offence. It is difficult to agree as to what should be regarded as unjustified variations in sentencing, even for that matter, what constitutes an unjust sentence or which types of disparity are warranted or unwarranted. Spohn (2002) has identified three other more. Some scholars have argued that when the term disparity is used without reference to a particular standard, it is an empty word (Tonry 1996:186).

'Unwarranted disparity' is the phrase commonly used to describe unjustifiable or unjust differences in sentences or sentencing patterns. However what is regarded as unwarranted may vary from jurisdiction to jurisdiction so that the substitution of words does not necessarily resolve the problem on a philosophical level. Determining whether unwarranted

disparities exist in any given instance involves both subjective perceptions and objective elements so that:

> "For most people in most places, as a normative matter, "unwarranted" disparities exist when sentences in general are disproportionate to the relative severities of offences for which they are imposed" (Tonry 1996:187).

Even where a general consensus exists as to what sort of disparities in a given context constitute unwarranted disparities, the question of degree of difference between sentences as well as the severity of sentences form an important part of the evaluation.

It has also been argued that disparity is sometimes wrongly used interchangeably with discrimination (Spohn 2002:132-133).This not is surprising since it is the research on disparities associated with discrimination especially race and gender discrimination, that attracts the most attention (see for example Martin and Stimpson 1997/1998, Hood 1992,Spohn 2002).

4.3.1 The Merits and Demerits of Consistency: The Equality Problem

One of the objectives of the international reform movement since the 1970s has been to reduce disparity and discrimination in sentencing (Ashworth 1992 (a&b); 1996, Spohn 2002). Consistency in and of itself is not unproblematic. Consistency may undermine justice if applied in a manner that would tend to undermine any of the two limbs of the equality injunction: 'treat like cases alike' and 'treat different cases differently' (Tonry 1992:32).

Some sentencing guidelines (e.g. Minnesota guidelines) are relatively rigid in that they exclude from calculus any consideration of such variables as age, and sex when sentencing. It is possible to argue that the exclusion of age, sex and similar variables though, intended to reduce variations in sentences

based on these variables, means that there is a violation or a risk of violating the second part of the equality injunction if one believes that individuals with varying attributes should be regarded as objectively different or differently-situated. The argument in the other direction also carries equal force. It may be argued that the inclusion of variables such as age, gender or race in the calculus means that offence situations that are otherwise similar would be treated differently simply because of these variables thus undermining the first part of the equality injunction.

These factors have been identified as being amongst other factors likely to have an influence on the decision-making process at sentencing stage (Ashworth 1983:46-55). Some of these factors especially previous convictions have been shown to have some influence on the outcome (Ashworth 1983: 29-30). Numerous studies in the United States of America have shown that legal variables are reliable predictors of the sentences likely to be passed by the courts (Martin and Simpson 1987/88). It has been found that it is important when measuring the impact of legal variables, to separate them from non-legal variables (Hagan 1974; Spohn and Welch 1987, Spohn 2002). Sometimes the judge is required by law to take into account factors that we have here classified as non-legal variables thus to all intents and purposes treat them as legal variables. That somehow blurs the boundaries that are assumed under in the classification to separate the two groups of factors.

Whether these variables tend to increase disparities or reduce them or perhaps more accurately, whether such disparities are warranted or unwarranted is clearly a contentious point.

4.3.2 Use of Sentencing Commission Guidelines to Manage Discretion and Reduce Disparities

Research shows that sentencing guidelines introduced by sentencing commissions in the US reduced disparities (Anderson et al 1999) and including racial and gender differences in the punishment of offenders

(Spohn 2002:288–289). Evaluative research seeking to measure the impact of adjustment of discretion has tended to use the level of compliance with guidelines as an indirect measure of consistency. Consistency in its turn is often used to imply lack of unwarranted disparity. In the states that introduced guideline the compliance rate was over 80% (Tonry 1988).

However, the impact of guidelines tended to vary to a significant degree according to, amongst other factors, whether the guidelines were voluntary or prescriptive (Tonry 1988). It also shows that, generally, voluntary guidelines have lower compliance rates than prescriptive guidelines (Tonry 1988). This may well explain to some degree at least, why, many states in the U.S that initially experimented with voluntary guidelines after they discarded indeterminate sentencing, have, with a few exceptions, abandoned them.

High or low compliance levels are not in themselves a completely reliable indicator of success or failure of any attempt to structure discretion. What may appear, superficially, to be a high compliance rate may, in some instances, actually mask displacement of discretion to other areas or the circumvention of new rules (Tonry 1988). This is more likely to be the case where judicial resistance to reform is particularly strong (Ashworth 1992(a)). That in turn suggests that other variables, such as the attitude of the judiciary and other officers within the criminal justice, also play an important role in the success or failure of any reform initiatives concerning the use of discretionary powers. This has tended to blunt somewhat claims that have been made about the effectiveness of prescriptive guidelines as a tool for reducing disparities.

Above criticisms, notwithstanding, the overall conclusions of reviews of research on guidelines show that, compliance with prescriptive guidelines

was high. Thus it appears that the form guidelines take is critical to the success of any initiative designed to alter sentencing patterns and practices.

4.3.3 Mandatory Minimum Sentences

Mandatory minimum penalties tend to increase the risk that there will be a violation of the second half of the equality injunction ('treat different cases differently') because mandatory minimum legislation takes away the flexibility that judges require to take account of circumstances peculiar to each case may be. So in effect the judges find themselves having to impose the mandatory sentence whatever the circumstances of the individual case. Research from the U.S shows that judges and prosecutors find ways of circumventing mandatory minimum penalties if they are unhappy with the mandatory minimum penalty (Tonry 1988). A study by United States Sentencing Commission found 40% non-compliance rate with mandatory sentences while other studies found high levels of non compliance and circumvention in New York, Massachusssets and Michigan. Even though it is not clear whether the same degree of non- compliance and circumvention occurs in Botswana, the difficulties caused by mandatory penalties have been clearly articulated in a number of cases that have gone to the higher courts on appeal(e.g *Badisa Moatshe* v *the State(Court of Criminal Appeal No 26/2001)*. Thus despite lack of systematic research on mandatory penalties in Botswana, the nature of cases that reach the higher courts would appear to suggest they increase risk of violating the second part of the equality maxim.

4.3.4 Guideline Judgements

Appellate review has not been found to be a satisfactory corrective measure as far as consistency in sentencing is concerned in the English legal system. (Ashworth 1992(a):282–284). However, appellate review would appear to be more suited to dealing with extreme cases. Even though wide powers that judges have in sentencing might well be the source of disparity in each of the

two systems that make up the dual system in Botswana, the focus of much public discontent seems to be inter-system rather than intra-system disparities (see Kirby 1985, Hansard 1996, Boko 2000).

4.4 The Nature and Scope of Sentencing Discretion in Botswana: An Overview

There has been relatively little debate in Botswana outside the courtroom concerning the subject of judicial discretion and less still that of sentencing discretion. The only time in recent memory when sentencing discretion entered public discourse was after the outrage caused by case of *Baeta Ngwenya* v *The State High Court Miscellaneous Application No. 47/97* (unreported). The case involved a woman who was given a 10 year mandatory penalty for robbery after she had allegedly used force to extract a very small amount of money from her friend. Thus unlike in developed countries where discretion is widely debated in national newspapers, academic and public forums, especially parliament, in Botswana it is hardly ever given serious coverage or treatment. It has featured as a subject of serious debate in the House of Chiefs but then only as part of a broader debate about the loss of powers by chiefs. To that extent it has been and remains only of symbolic value in the politics of dualism. Similarly reference to it has been made in the National Assembly during the passing of a bill on Stock Theft. But such concern as was expressed did not provoke further or broader debate outside parliament itself. In any case parliamentary debates have not generally been concerned with principles surrounding discretion as such.

Under Botswana's legal system the discretionary powers of judges in sentencing matters vary in relation to different aspects of sentencing. These range from how the penalty is fixed to broader matters such as the aim of the sentence in the specific instance or in respect to a particular class of offences or to principles and policies that govern sentencing in its various dimensions. In assessing what sentence is appropriate in a particular instance, judges are

expected to weigh three factors: the nature of the crime, circumstances of the offender and the interests of society (*Kolagano* v *The State 1992 BLR 419 per Gyke-Dako*). The factors to be considered are cast in such broad terms that they do not really mean much so further analysis is required to develop an appreciation of what these elements entail. Appellate review offers general guidance and sometimes very specific directions regarding various aspects of sentencing and in that has the effect of channelling the thinking of judges in the desired direction and may occasionally restrict the discretion of judges in sentencing matters.

4.5 General Framework for the Exercise of Sentencing Discretion in Botswana

4.5.1 Sentencing Aim(s)

In Botswana there is no general aim or primary sentencing rationale with a statutory or similar force behind it to provide a guidance and direction in sentencing. Generally speaking, it is left to the judge to determine the sentencing aim for herself/himself in respect of most offences. There are at least three exceptions to this general rule. The first concerns mandatory minimum sentence enactments. Often passed in response to a perceived escalation in a particular type of crime they usually have deterrence as the stated aim of the enactment. The second exception is juvenile justice, whose aims unlike those of the adult system are clearly stated. The third concerns those instances where, for public policy or other reasons, higher courts take it upon themselves to direct what the sentencing aim in respect of a particular offence shall henceforth be. In such cases the higher courts often state the sentencing aim that must be at the back of the trial court's mind when dealing with such offences. It could therefore be said that the higher courts have, within these limits, tried to develop a sentencing policy. For instance they have indicated when it may be appropriate to impose sentences for reasons of deterrence, retribution and reform. The theme of deterrence is one

that courts return to quite regularly. The higher courts have also pronounced on the general approach to custodial sentences where the persons concerned are first offenders (*State v Sethunya* 1986 *BLR 423).*

4.5.2 Sentencing Principles

The higher courts (i.e. the High Court and the Court of Appeal) provide guidance regarding general principles to be considered when passing a sentence. Where principles are laid down in guideline judgements regarding such matters as mitigation they tend to be very general so that the weight to be given to different factors is a matter of discretion for the judge. Even though these judgements tend to constrain the discretionary powers of judges somewhat, their powers nevertheless still remain fairly wide. In deciding what the quantum of punishment should be, judges must take into consideration aggravating and mitigating factors. The range of factors that may be taken into account, especially mitigating factors, is potentially vast, and only a tiny percentage is mentioned in guideline judgments. It is therefore necessary to consider some form of rough classification in order to facilitate discussion. Following Ashworth (1995 Chapter 5) I find classification of aggravating and mitigating factors according to whether they are general to all offences or specific to particular offences, useful. Ashworth (1995) has usefully further broken mitigation down into an additional category of personal mitigation.

4.5.3 Aggravating Factors

(a) *General aggravating factors*

Some general aggravating factors in Botswana include, amongst other factors premeditation and wickedness of the offender. For instance *Puso* v *The State (1998 BLR 422)* in which Tebbutt J on behalf of the bench of the Court of Appeal in an appeal by a youthful murderer against death sentence for murder said: 'The death sentence is, by virtue of the provisions of section 203

of the Penal Code, mandatory where a person of 18 years of age or older is convicted of murder without extenuating circumstances. It ought to be imposed on a teenager who has committed murder if it actually appears that he killed *out of inherent wickedness"* (*Puso* v *The State 1998 BLR 422*) (emphasis added).

(b) *Specific aggravating factors*

There are two ways in which specific aggravating factors may be incorporated into an offence. The offence-creating statute may specify aggravating factors or provide for a separate offence incorporating an aggravating feature. In Botswana legislation tends to be crafted in such a way as to separate sub-categories of the same general offence thus obviating the need to emphasise specific aggravating features, as is often the case where the offence categories are very broad. That is generally the case with most common offences such as those offences triable-either-way that have been selected for special attention in this study. The main offences categories are in effect gradations of the same general offence e.g. Assault Common, Assault Occasioning Bodily Harm, together with Grievous Bodily Harm belong to the same broad category. Each of these sub-categories may be fairly wide. As a result there may be some overlap between sub-categories of the same offence and therefore confusion as to that appropriate charge/sentence; consequently the higher courts have sometimes had to refine the meanings of particular offences where they find that statutory meanings of particular offences are vague or insufficiently distinct from parallel offences. However, each of these sub-categories may have some aggravating features specific to it.

4.5.4 Mitigating factors

Even though there is no law requiring the trial court to allow the offender or her/his legal representative the opportunity to address the court in

mitigation, the Court of Appeal has ruled that failure to do so is an irregularity (*Hilda Ofetotse v The State (Court of Appeal Criminal Appeal No. 5/1989)*). Such an irregularity may not be fatal if it does not result in the failure of justice but is nevertheless regarded in a serious light by higher courts. In *Hilda Ofetotse* v *The State*, Bizos J.A said in relation to mitigation: "...Despite absence of any statutory provision entitling an accused to address the court in mitigation, there is a well established rule of practice in the Courts of Botswana, South Africa and elsewhere whereby the defence is afforded the opportunity of tendering evidence in mitigation and making submissions to the Court before the sentence is passed. This practice is well known to all of us and we intend it to be followed".

(a) *General mitigating factors are those that go to the seriousness of the offence.* These may relate to harmfulness/potential harmfulness of the conduct for which the offender has been convicted and her/his culpability.

As regards the latter Ashworth (1995) has quite rightly pointed out that some of the factors that are seen as reducing culpability are factors or circumstances that fall just short of a defence. In other words while they would fail as a defence in respect of the offence for which the offender has been convicted they could work to the advantage of the offender if raised in mitigation.

(b) *Specific mitigating factors*

Certain mitigating factors are specific to the offence concerned, for example, in murder cases the Penal Code provides that: 'in deciding whether or not there are any extenuating circumstances (*Puso* v *The State*, 1998 BLR 422) the court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs'

(Section 203 of the Penal Code). Such considerations do not apply in respect of other offences.

(c) *Personal Mitigating Factors*

These cover a range of factors some of which may also fall under general mitigation e.g. youthfulness.

(i) ***Youthfulness***: courts in Botswana are anxious to give the young, especially where there appears to be a chance for reform, (*State* v *Baliki Charlie High Court Review Case No. 140/1983*), a second chance. In-school youth with a prospect for further education may find that they often escape imprisonment for minor to moderately serious offences. If it is deemed necessary to send them to prison part of the sentence may be suspended and in serious cases reduced on account of their youthfulness. Immaturity and other factors associated with being young such as impulsivity are matters that courts must weigh when sentencing young persons. In *Puso* v *The State 1998 BLR 421* Tebbutt J.A stated that 'Youthfulness is in itself regarded as an extenuating circumstance. In South Africa, where the law is the same as in Botswana, the Appellate Division of the Supreme Court has held that a teenager is prima facie regarded as immature and on that ground extenuating circumstances can be found unless there are factors which would negative such immaturity'.

(ii) ***First offenders***: the general courts are slow to send first offenders to prison. However a statement such as this must necessarily be qualified as the practice is not immutable (*State* v *Sethunya* 1986 BLR 423). Previous convictions are not, if the correct principles are followed, aggravating features. An offender with prior convictions for a similar offence generally loses the sympathy of the courts in relation to that

particular offence as it would appear that s/he is incorrigible (Ashworth 1995) There is no guidance as regards to weight given to previous convictions of a similar kind. Previous convictions for the same category of offences may be of entirely different value in terms of seriousness but they are not generally reflected in the current sentence. Suppose offender A, who has just been convicted for the offence of Assault Common and records show that he has a previous conviction for Grievous Bodily Harm. Offender B has similarly been convicted for Assault Common but has previously been convicted of a minor assault (affray). All other things being equal, is it fair that he should receive the same punishment as A? Furthermore as things stand it does not appear that a considerable crime – free period would earn the offender a discount on her/his sentence.

(iii) ***The Guilty Plea***: The courts do not appear to have taken a firm view on what the effect of guilty plea on the sentence should be (*State* v *Rahii* 1982 BLR 252). It would appear that some believe the effect of the guilty plea should be neutral (Ashworth 1995) but generally if certain elements like a display of contrition is present many judges would take the view that should earn the offender a discount on her/his sentence (*State* v *Mavele Phili and Another)* High Court Review Case No. 355/1982 (unreported). However, it is misdirection for the sentencing court to punish an offender more harshly than it would otherwise do simply for pleading not guilty (*State* v *Phillimon 1983 BLR 30*).

(iv) ***Social Circumstances of the offender and Social Impact***: the courts in Botswana do not, as a matter of general practice, call for a probation or social inquiry or pre-sentence report when they are set to pass a sentence on an offender. However the offender is free to call attention

to his personal circumstances and how those around him might be affected by the sentence. Generally such matters as the employment status of the offender may very well influence the court's thinking if it appears that sending an offender to prison is likely not to benefit society or might have an excessively negative impact when all factors are taken into account. As regards other personal factors, however, the courts appear to have ruled out the accused person's ill health as a mitigating factor 'save in exceptional cases or unless it has some relevance to the causation of the offence.'

4.5.5 Modulating Disparities through Observance of Proportionality Principle

The present study is concerned with apparently unjust variations in the punishment of similarly situated offenders for similar offences. The dual system appears to be designed to allow or accommodate tolerable differences possibly emanating from value-based differences between the received and indigenous systems without presumably undermining the ranking of offences in the system as a whole. In other words, it was not intended that allowable differences in punishment should undermine the proportionality principle. A system may for instance be said to embrace the proportionality principle:

> "if the object is recognised to be a rough attempt to equate the size of the fine or the length of imprisonment to the gravity of the category of offence as contrasted with offences of other categories (theft contrasted with murder, for example) and the gravity of the circumstances in which the offence was committed as contrasted with those in which other offences of the same category are committed.." (Cross (1975) as quoted in Walker 1991:101).

The legal system in Botswana may be said to take cognisance of this principle for a number of reasons. Firstly, it recognises the proportionality principle implicitly in so far as the primary source of criminal law in Botswana, the Penal Code, is predicated upon the idea of proportionality in that it is based on an underlying system of ranking offences and punishments. However, that in itself does not tell us much about how the gravity of offences may be measured. This issue is explored further in Chapter Five.
Secondly, the proportionality principle is given statutory expression in S. 17 of the Customary Court Act, which requires customary courts to adhere to the proportionality principle. It provides that "no customary court shall subject any person to any punishment which is not in proportion to the nature and the circumstances of the offender. Thirdly, higher courts have accepted and applied the principle in a number of cases while at the same time showing disapproval of certain degrees of disproportionationality punishment (*Desai* v *The State 1985 BLR 582; and Fredrick Mokone* v *The State* Court of Appeal *Criminal Appeal No. 26/2001 Badisa Moatshe* v *the State(Court of Criminal Appeal No 26/2001).*

4.5.6 Significance of the Proportionality Principle in Modern Legal Systems
Proportionality is widely recognized and acknowledged in modern criminal justice systems, even if only implicitly and inconsistently as being of value in itself, if not for pragmatic reasons then from an ethical point of view (von Hirsch 1990, von Hirsch and Ashworth 2004). Proportionality is associated instinctively with fairness in the mind of the ordinary person.

There is hardly any state-sanctioned system of penalties anywhere in the world that does not at least pay lip to the broad principle that offences must follow sliding scale that accords with severity of punishment, even if disagreements remain between societies regarding the ranking of offences and appropriate punishments for those offences. To that extent

proportionality is an important element in modern justice systems and is as such incorporated into their philosophies and practices in one form or another. The international community generally disapproves of the kind of arbitrariness such as that which characterised punishment in pre-enlightenment Europe (Roshier 1989 Chapter 1).

Thus proportionality informs punishment in modern criminal justice systems even though in terms of general justifications of punishment it sits rather well with retributivism and less so with other philosophical justifications (von Hirsh: 1990). While it has come to be seen as rather unconvincing for modern utilitarians to argue in favour of proportionality, Bentham, the father of utilitarianism recognised the value of proportionality in sentencing (Walker 1991: 103-104).

The principle of proportionality is regarded as a part of the Common Law in some countries that belong to the common law tradition such as Australia and Canada. However, it is also clear that even in the Common Law countries it has been given varying degrees of prominence in different jurisdictions at different times (Ashworth 1995: 86).

More broadly, the importance of proportionality has been recognised and underlined by the United Nations' International Covenant on Civil and Political Rights (hereafter ICCPR). Many countries have ratified the ICCPR protocol and agreed to be held up to its standard(s).

From a purely pragmatic view it has been suggested that proportionality is important for inspiring respect for law (Hart 1968). Conversely, disproportionate punishment undermines respect for the law. Perhaps that is why it has been argued that most people intuitively regard proportionality as part of a fair system of justice.

A series of decisions from the higher courts in Botswana have affirmed the importance of proportionality in the country's legal system. For instance, in *Badisa Moatshe v The State (Court of Criminal Appeal No 26/2001* (unreported)):

> "The cumulative effect of such consecutive sentences is undoubtedly likely to result in an accused person being imprisoned for excessively lengthy periods, which would be disproportionate to the offence concerned. *It would go beyond the purpose of the legislature in wishing to curb the mischief created by those offence*" (emphasis added).

In the case of *Desai and Modi* v *The State* (1985 BLR 585) almost a decade earlier the court ruled that to impose a long term of imprisonment and together with strokes amounted to inhuman and degrading punishment.

Bearing in mind that the cases cited concerned serious crimes which are subject to mandatory minimum penalties, the point I am making here is two-fold. The first point is that higher courts have established that the phenomenon of disproportionate punishment exists and that the proportionality principle operates as a limiting principle in sentencing even in cases involving consecutive mandatory minimum sentences (see e.g *Badisa Moatshe* v *the State* Court of Appeal Criminal Appeal No 26/2001(Unreported), *Frederick Mokone and Moses Dikago v The State* Criminal Appeal No 22/2003(Unreported).

Second, that combining punishments may result in disproportionate punishment, at least in some cases, and in serious crimes such combinations could even amount to cruel and inhuman punishment (*Desai and Modi* v *The State* 1985 BLR 585).

4.5.6 General Factors Tending to Increase Disparities

The preceding discussion suggest that there are some factors inherent in the legal system that would tend to increase disparities. Firstly, it is evident that judges in Botswana have very wide discretion in sentencing matters safe for a few areas where the legislature has for purposes of deterrence, introduced mandatory minimum sentences. For most common crimes the applicable regime is that which allows the judge to decide on the appropriate sentence below a fixed maximum for that offence or offence category. As a rule the maxima is pitched very high.

Secondly, there is no general overarching sentencing aim or policy to which judges may tailor their sentencing decisions. It is most often a matter for the judge to decide what s/he considers to be the appropriate sentencing aim. However, the higher courts do from time to time, after taking due account of emerging crime trends, public and governmental concerns, direct that certain crimes should be punished in a certain way. But this on its own does not amount to a general sentencing policy. A sentencing policy requires statutory authority and articulation.

Thirdly, higher courts may not interfere with sentences passed by lower courts purely for reasons of consistency. More substantial reasons than that must be present before they interfere.

Fourthly, judges also enjoy a lot of discretion in respect to other aspects of sentencing such as mitigation. There is very little guidance as to what factors may be considered and what weight they should be given.

These factors individually and together increase the sources and likelihood of disparities in sentences including inter/intra judge disparities as well as various types of inter-court disparities. The question is whether these

disparities are warranted or unwarranted disparities, or whether, if they are warranted, they are of an acceptable magnitude.

4.6 Discretion as to Punishment and Combination of Punishments

All things being equal, magistrate courts are expected to inflict the penalty prescribed in the offence-creating section of the applicable law (usually the Penal Code), and providing the prescribed penalty is not a mandatory minimum penalty, they may impose any quantum beneath the maximum (see Appendix C). Otherwise the court may replace the prescribed penalty with another punishment where substitution is allowed (see Table 1 below) or suspend the sentence partially or wholly upon certain conditions, (Section 308 CP&E) release offender with a caution or upon some other condition (Section 32,CP&E).

Substitutability of Punishments– Penal Code (section 27 Penal Code)

Table 1

Prescribed Sentence	Substitute/Addition
Imprisonment	Fine instead or in addition Corporal Punishment instead or in addition
Corporal Punishment	-
Fine or Imprisonment	Either one or both. Choice between the two at court's discretion
Fine Only	Offender will suffer imprisonment if they default.

Apart from restrictions relating to substitutability of punishments a number of restrictions apply in to the application of some of the punishments (see Appendix C). A customary court may sentence a person who has been convicted to a fine, imprisonment, corporal punishment or a combination of these providing it does not, amongst other things, exceed its jurisdiction in respect of any of these penalties (section 17(1) Customary Court (Amendment) Act, 2002) or run foul of certain stipulated restrictions. Courts may also bind a convicted person to keep the peace (Section 18(1) CCA). The

court may, where a charge has been proved, and having regard to certain factors, discharge the accused without proceeding to conviction if it thinks that it is 'inexpedient to inflict any punishment (Section 19(1) CCA). Customary courts also have the power to suspend the sentence partially or wholly upon certain conditions (Section 23 CCA) release offender with a caution or upon some other condition.

Customary courts are not bound to impose sentences that are prescribed in the offence-creating sections of the Penal Code and other laws except where they are otherwise required to do so. Thus the punishment or mix of punishments that a court imposes in any particular instance is a matter entirely at the discretion of the court. By extension, the maximum penalty that a customary court may impose for a particular offence is entirely independent of the maximum prescribed by the Penal Code. The upper limit in each instance is a function of the sentencing powers of the judge presiding over the case (Section 11(2), Customary Court Act). However, whether a customary court can actually exceed the maximum penalty prescribed in the Penal Code remains only a theoretical possibility because the warrants of chiefs fall far short of the maximum allowable punishment for virtually all the offences.

Section 17(1) of the CCA imposes some restrictions on the powers of customary courts to punish. It provides that 'Subject to the provisions of subsections (2), (3) and (4) and section 20 and to the provisions of any other law for the time being in force a customary court may sentence a convicted person to a fine, imprisonment, corporal punishment or any such combination of such punishments but shall not impose any punishment exceeding those set out in its warrant (S17, CCA).

Let us consider briefly the character and import subsections 2, 3 and 4 of the CCA 17 as well as CCA 20 in the context of the differences between the discretion of magistrate and customary court judges in relation to choice of punishment or combination of punishments.

(a) S 17 (2): 'No customary court shall sentence any female or any person who is, in the opinion of the court, over the age of 40 years, to corporal punishment'. Section 17(2) is similar to S28 (c) of the Penal Code which essentially means that from a comparative point of view its effects are cancelled out by the latter.

(b) S 17 (3) 'No person shall be sentenced to corporal punishment other than for an offence specified in the Schedule of, to this Act: provided that where any person under the age of 18 years is convicted of any offence a customary court may, in its discretion, order him to undergo corporal punishment in addition to or in substitution for any other punishment.'

The following offences are listed under the Schedule referred to in CCA17 (3): attempted rape, indecent assault on a female, defilement and attempted defilement of (i) girls under the age of 16 years and (ii) idiots and imbeciles, disabling in order to commit an offence, assault occasioning actual bodily harm, robbery and attempted robbery, burglary, stock theft and offences contrary to the Stock Theft Act.' The majority of the offences listed in the Schedule are not triable in customary courts except for assault occasioning bodily harm, burglary and stock theft and related offences. The effect of the qualification of the restriction in respect of males under the age of 18 years is that corporal punishment becomes applicable to a broad band of offences commonly tried in the customary courts such as common nuisance, theft common, assault common and use of insulting language. However, the Penal Code has similar provisions relating to males under the age of 18

years though the applicability of corporal punishment in respect of this group is prohibited where imprisonment of a convicted person has been ordered for defaulting from the payment of a fine or a sum ordered to be paid as compensation and where imprisonment has been ordered for failure to surrender any sum ordered to be forfeited to the state (Section 28(4), Penal Code).

CCA 17 (4) 'No customary court shall subject any person to any punishment which is not in proportion to the nature and the circumstances of the offender.' It is on the face of it doubtful that this provision has any, or more generously, much effect, on the sentencing practices of customary courts even though in relation to imprisonment certain safeguards have been put in place (Sections 22(3), (4) and 44 of the CCA).

Section 20 of the CCA reads thus 'No customary court shall impose upon any person any punishment unless a criminal trial has been held in accordance with the provisions of the Customary Courts (Procedure) Rules.' As is evident, this provision does not, like the others we have considered so far, relate to choice as punishment but rather to procedure.

But overall, the law gives customary courts flexibility as to punishment and punishment combinations that is not available to magistrates. However CCA17 (4) cautions against and prohibits customary courts from inflicting punishment which is 'not in proportion to the nature and circumstances of the offence and the circumstances of the offender' (Section 17(4) Customary Courts (Amendment) Act, 2002) However, the value of CCA 17(4) as a restraint against disproportionate punishment is doubtful.

4.7 Conclusion

This chapter has considered the general framework for exercising sentencing discretion in Botswana. It also considered various aspects of sentencing discretion which are likely to lead to disparities. In addition the chapter discussed variations in the structure of discretion of magistrate and customary court judges regarding combination of punishments that they may impose.

CHAPTER FIVE

5.0 RESULTS: CENSUS SURVEY, SUPPLEMENTARY SURVEY AND DERIVATIVE DATA

This chapter considers results of the study in relation to the primary hypothesis and the minor hypotheses on four levels by order of complexity of the question to be answered. First, it considers the basic questions relating to the distribution and punishment of offences generally, by type of court (Section A). Second, it examines general sentencing patterns for offences triable-either–way (Section B). To that end it looks at combined figures in relation to two broad categories of offences: property offences and offences against the person. Third, the various offences that make up these broad categories are examined and discussed. Fourth, certain offence factors, here identified as legal and non-legal variables, are examined and compared to see the extent of their influence on sentencing outcomes (Section C).

5.1 Methods and Limitations

Even though the issues of methodology were canvassed in the Methodology Chapter, it would be remiss not to remind the reader in general terms what types of data were used in the study and about the major limitations relating to the use of such data before we proceed with the analysis of the results of the study. For ease of reference some of the issues relating to the strengths and limitations of various techniques used in the study such as those concerning measurement of and relative weight assigned to a certain variables are discussed in the sections devoted specifically to those variables.

5.2 Types of Data Used

Four sets of data were used in this study namely data from the general census survey, data from detailed study of case records from the main site at Mochudi and data extracted from and based on an analysis of census and supplementary data tables. Primary data for the study was gathered through a census of records spanning the years 1991-2001 and involved a total of 10

024 cases. Of these were 504 unclassifiable because of missing details so that those that could be unambiguously assigned numbered 9 520. A supplementary study to gather further information relating to legal and non-legal variables was also conducted at Mochudi. It involved 1014 cases. These cases involved a number of triable-either-way offences that were tried in magistrate and customary courts at Mochudi from 1996 to 2000.

Data relating to the distribution and punishment of cases was generated mainly from the census data. However, supplementary information regarding these issues was also gleaned from the interviews. For multivariate analysis the primary source of information was the case records from Mochudi.

SECTION A

5.3 Introduction

In this section I consider patterns in the distribution of offences by type of court. In addition I make findings in relation to hypothesis number 1 (H1) and consider possible explanations for patterns in the distribution of offences.

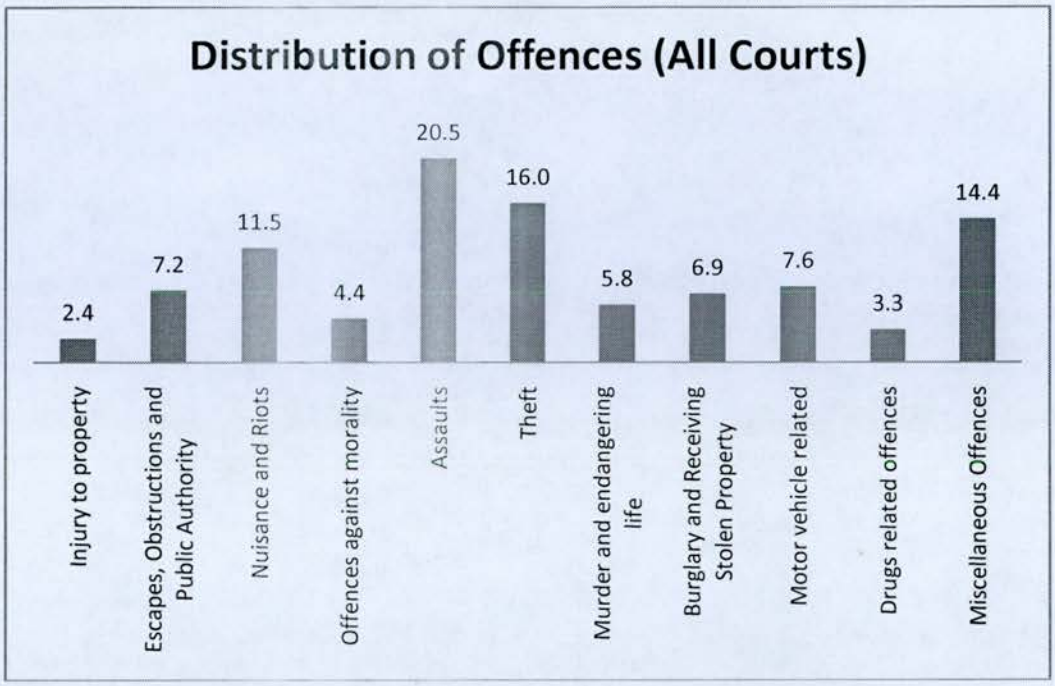
Hypothesis 1: There should generally be an uneven distribution of criminal cases between the courts.

5.3.1 Presentation of Results

5.3.2 Distribution of Offences

Figure 1 below shows combined figures of all offences tried in customary and magistrates in the period 1991-2001. Figures indicate that assaults and theft-related offences dominated court business in these courts at 20.5 % and 16 % of all transactions, respectively. Nuisance and riot-related offences were the third common offence group at 11.5 % of the total.

Figure 1: Distribution of Offences (All Courts)



Source: General (census) survey data

NB: Any offence group that on its own constituted less than two percent of the total was subsumed under Miscellaneous Offences.

5.3.3 Changes in the Distribution of Offence Groups as a Proportion of Business Transacted By Each Type of Court

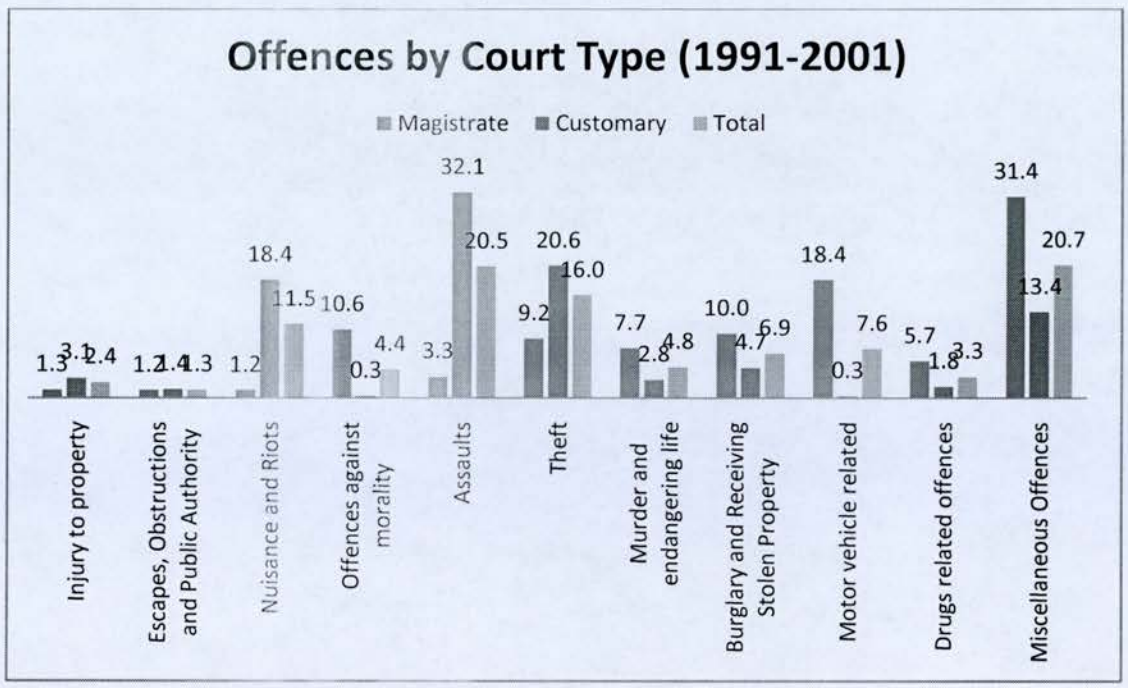
Distribution of Offences by Court Type 1991-2001

Figure 2 below show trends and patterns pertaining to the distribution of offences tried by type of court from 1991 to 2001. Overall, figures for customary courts for the period 1991-2001 show that the most common offence group tried by the customary courts was assaults and related offences. Of the 5 694 offences tried in customary courts over that period, 32.1 percent of the cases were assault-related offences, followed by theft - related offences and nuisance and riot-related offences at 20.6% and 18.4 % respectively. It is interesting to note that nuisance-related offences, which are

amongst the lowest ranked offences or the least serious offence category, were the third most common offence in the customary courts.

In contrast, the most common offences tried in magistrate courts over the same period were motor vehicle/traffic-related offences (18.4 %), offences against morality (10.6 %), theft-related offences (9.2 %) and miscellaneous offences (31.4 %). Even though nuisance and riot-related offences were the third most common group of offences tried before customary courts, they constituted less than two percent of offences handled by magistrate courts.

Figure2: Distribution of Offences by Court Type 1991-2001



Source: General survey data

NB: Any offence group not shown on its own in the chart was subsumed under Miscellaneous Offences.

5.3.4 Periodized Distribution of Offences All Courts

Table 2 shows periodized statistics for all offences, for all the courts, covered by the study spanning three sequential time segments namely 1991-94, 1995-98 and 1999-01 representing the early, middle and closing years of that decade. Of the three most common offences, namely assaults, theft and nuisance-related offences, only theft-related cases showed a consistent decline as a proportion of offences tried in the three periods. It declined from 18% to 13.4%. The other two offence groups show neither a consistent pattern of growth or decline, with figures going up or down at different time periods. A breakdown of the overall figures (Tables 3 and 4) shows periodized patterns for magistrate courts and customary courts respectively over a ten year period.

Table 2: Periodized Distribution of Offences (All Courts)

All courts								
	91 - 94		95 - 98		99 - 01		Total	
Type of Offence	N	%	N	%	N	%	N	%
OASA	1	0	0	0	0	0	1	0
RPT	72	2	71	1.9	29	1.4	172	1.8
CAO	0	0	2	0.1	0	0	2	0
ORAJ	13	0.4	6	0.2	3	0.1	22	0.2
E&O	59	1.6	42	1.1	25	1.2	126	1.3
OAPA	291	8	183	4.8	91	4.3	565	5.9
ORR	0	0	1	0	0	0	1	0
OAM	88	2.4	196	5.2	137	6.5	421	4.4
ORMPC	0	0	1	0	0	0	1	0
NHC	414	11.4	299	7.9	209	10	922	9.7
MM	19	0.5	41	1.1	36	1.7	96	1
OMS	35	1	55	1.5	42	2	132	1.4
OELH:	128	3.5	113	3	78	3.7	319	3.4
CRN	0	0	1	0	2	0.1	3	0
Assaults	745	20.5	793	21	413	19.7	1951	20.5
Theft	654	18	589	15.6	282	13.4	1525	16
OAS	31	0.9	29	0.8	1	0	61	0.6
R&E	11	0.3	31	0.8	33	1.6	75	0.8

B&H	118	3.2	177	4.7	82	3.9	377	4
False pretences	25	0.7	32	0.8	17	0.8	74	0.8
RPS	163	4.5	81	2.1	29	1.4	273	2.9
MDP	86	2.4	93	2.5	47	2.2	226	2.4
FCC:	9	0.2	14	0.4	8	0.4	31	0.3
ACA	2	0.1	1	0	0	0	3	0
MVRO	139	3.8	361	9.5	221	10.5	721	7.6
MO	243	6.7	289	7.6	165	7.9	697	7.3
DRO	137	3.8	119	3.1	61	2.9	317	3.3
Other	159	4.4	161	4.3	86	4.1	406	4.3
Total	3642	100	3781	100	2097	100	9520	100

Source: General survey data (NB: In this table, unlike in the preceding graphs, some offences are not subsumed under certain general categories like in the latter e.g Riots and Other Offences against Public Tranquility is not combined with Nuisance-Related Offences)

Keys: OASA: Offences Against State Authority ; RPT: Riots and Other Offences Against Public Tranquillity; CAO: Corruption and the Abuse of Office; ORAJ: Offences Relating to Administration of justice; E&O: Escape and Obstructing Officers of Court of law; OAPA: Offences Against Public Authority; ORR: Offences Relating to Religion; OAM: Offences Against Morality; ORMPC: Offences Relating to Marriage and Possession of Children; NHC: Nuisances and Offences Against Health and Convenience; MM: Murder and Manslaughter ;OMS: Offences Connected with Murder and Suicide; OELH: Offences Endangering Life and Health; CRN: Criminal Recklessness and Negligence; OAS: Offences Allied to stealing; R&E: Robbery and extortion; B&H :Burglary, Housebreaking and similar offences; RPS: Receiving Property Stolen or Unlawfully Obtained and like offences; MDP: Malicious Damage to Property or Offences Causing Injury to Property; FCC: Forgery, Coining and Counterfeiting; ACA :Attempts and Conspiracies to Commit Crimes and Accessories After the Fact; MO: Miscellaneous Offences; MVRO: Motor Vehicle Related Offences; DRO: Drugs Related Offences; Other: Other type of offences.

5.3.5 Periodized Distribution of Offences in Magistrate Courts

Two of the most common offences in the magistrate courts namely ,motor-vehicle-related offences, and offences against morality, showed a steady rise over the three periods while theft, which was the third most

common offence, showed a dip in the middle period, and a slight growth in closing period.

Table 3: Periodized Distribution of Offences in Magistrate Courts

Magistrate Courts								
	91 - 94		95 - 98		99 - 01		Total	
Type of Offence	**N**	**%**	**N**	**%**	**N**	**%**	**N**	**%**
OASA	1	0.1	0	0	0	0	1	0
RPT	4	0.4	15	0.9	7	0.7	26	0.7
CAO	0	0	2	0.1	0	0	2	0.1
ORAJ	2	0.2	3	0.2	2	0.2	7	0.2
E&O	11	1.1	23	1.3	13	1.3	47	1.2
OAPA	67	6.5	136	7.7	87	8.4	290	7.6
OAM	78	7.6	191	10.9	137	13.2	406	10.6
ORMPC	0	0	1	0.1	0	0	1	0
NHC	4	0.4	14	0.8	2	0.2	20	0.5
MM	19	1.8	41	2.3	36	3.5	96	2.5
OMS	33	3.2	54	3.1	39	3.8	126	3.3
OELH	61	5.9	68	3.9	39	3.8	168	4.4
CRN	0	0	1	0.1	2	0.2	3	0.1
Assaults	28	2.7	68	3.9	29	2.8	125	3.3
Theft	111	10.8	148	8.4	93	9	352	9.2
OAS	3	0.3	0	0	1	0.1	4	0.1
R&E	10	1	30	1.7	30	2.9	70	1.8
B&H	68	6.6	129	7.3	64	6.2	261	6.8
False pretences	6	0.6	16	0.9	12	1.2	34	0.9
RPS	76	7.4	31	1.8	15	1.4	122	3.2
MDP	9	0.9	30	1.7	11	1.1	50	1.3
FCC	6	0.6	13	0.7	7	0.7	26	0.7
MVRO	129	12.5	359	20.4	215	20.7	703	18.4
MO	110	10.7	140	8	82	7.9	332	8.7
DOR	75	7.3	105	6	37	3.6	217	5.7
Other	121	11.7	139	7.9	77	7.4	337	8.8
Total	1032	100	1757	100	1037	100	3826	100

Source: General survey data

(NB: Comment on offence classification made in relation to Table 1 is also applicable to this table)

5.3.6 Periodized Distribution of Offences in Customary Courts

Table 4 below indicates that the most common offences tried before customary courts present a mixed picture in terms of distribution patterns over the three periods. Assault–related offences show a steady rise from 27.5% to 35.8% in 95-98 followed by slight increase to 36.2% in 1999-01. Meanwhile thefts show slight increase in the first two periods and a dip in the third. Nuisance-related offences which were the third biggest category, show a slight fall in the second period followed by a rise in the third.

Table 4: Periodized Distribution of Offences in Customary Courts

Customary Courts								
	91 - 94		95 - 98		99 - 01		Total	
Type of Offence	**N**	**%**	**N**	**%**	**N**	**%**	**N**	**%**
OASA	68	2.6	56	2.8	22	2.1	146	2.6
RPT	11	0.4	3	0.1	1	0.1	15	0.3
E&O	48	1.8	19	0.9	12	1.1	79	1.4
CAO	224	8.6	47	2.3	4	0.4	275	4.8
ORR	0	0	1	0	0	0	1	0
OAM	10	0.4	5	0.2	0	0	15	0.3
NHC	410	15.7	285	14.1	207	19.5	902	15.8
OMS	2	0.1	1	0	3	0.3	6	0.1
OELH	67	2.6	45	2.2	39	3.7	151	2.7
Assaults	717	27.5	725	35.8	384	36.2	1826	32.1
Theft	543	20.8	441	21.8	189	17.8	1173	20.6
OAS	28	1.1	29	1.4	0	0	57	1
R&E	1	0	1	0	3	0.3	5	0.1
B&H	50	1.9	48	2.4	18	1.7	116	2
False pretences	19	0.7	16	0.8	5	0.5	40	0.7
RPS	87	3.3	50	2.5	14	1.3	151	2.7
MDP	77	3	63	3.1	36	3.4	176	3.1
FCC	3	0.1	1	0	1	0.1	5	0.1
ACA	2	0.1	1	0	0	0	3	0.1
MVRO	10	0.4	2	0.1	6	0.6	18	0.3
MO	133	5.1	149	7.4	83	7.8	365	6.4
DRO	62	2.4	14	0.7	24	2.3	100	1.8

Other	38	1.5	22	1.1	9	0.8	69	1.2
Total	2610	100	2024	100	1060	100	5694	100

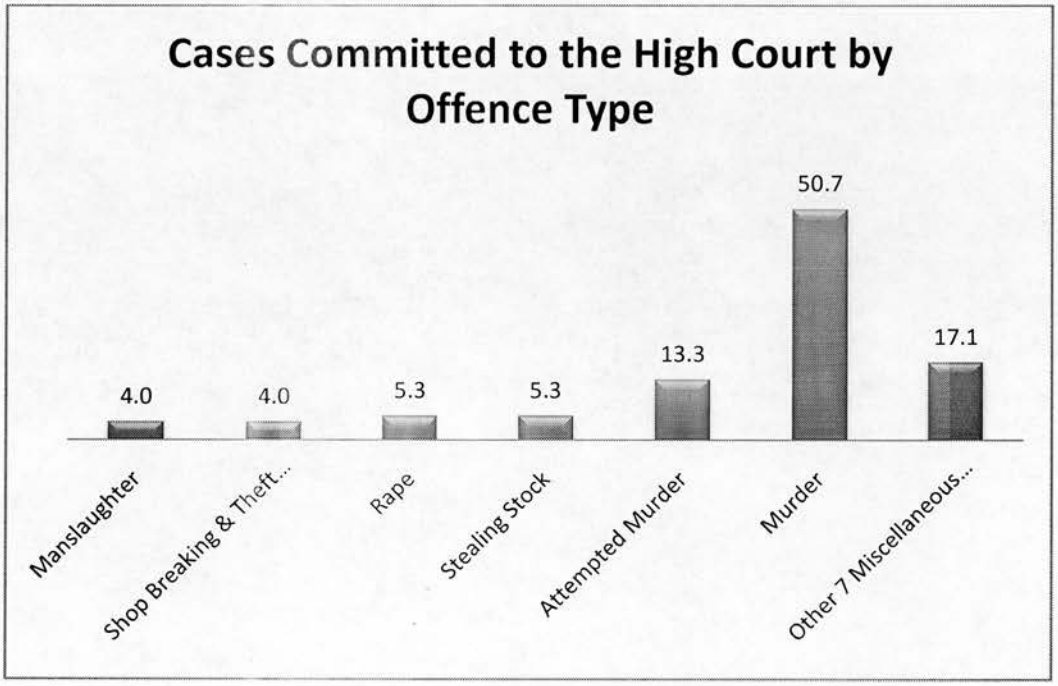
Source: General survey data

(NB: Comment on offence classification made in relation to Table 1 is also applicable to this table)

5.3.7 Cases Committed to the High Court

Figure 3 shows the types of cases committed to the High Court by magistrate courts in the period 1991-2001. In all, 75 cases, most of which were murder-related, were transferred to the High Court in that period. It is worth noting that murder is not triable in magistrate courts even though certain preliminaries are done there. As for other offences magistrate court would send them to the High Court for sentencing.

Figure 3: Cases Committed to the High Court by Offence Type



Source: General survey data

5.3.8 Patterns, Interpretation and Analysis

Statistical data from the two sites of Kanye and Mochudi showed large differences in the volume and type of offences tried in customary and magistrate courts over the period 1991-2001, generally. More significantly, there were differences in terms of overall and relative proportions as well as in real terms of triable-either-way offences processed by magistrate and customary courts. Furthermore, there were differences in the patterns and trends pertaining to these offences over time.

Overall, magistrate courts tried fewer offences (4187) than customary courts (5908) despite having the jurisdiction to try a wider range of offences than the latter. This pattern is consistent with patterns found by Bouman (1984) in the early 1980s and Women and Law Southern Africa more recently (1999). Customary courts try more criminal cases overall because they are more numerous and more widely dispersed geographically than magistrate courts. Whereas the volume of cases generated by Kanye and Mochudi magistrate courts represents the extent of cases handled by the general courts in those magisterial districts, cases handled by the Chief's Court at Kanye and Mochudi did not represent the majority of cases tried by customary courts within these villages and the areas under their jurisdiction because many more cases are handled by lower customary courts. The Chiefs' Courts serve as both courts of first instance and courts of appeal within their districts (Section 41(1) Customary Courts (Amendment) Act). Appeals handled by the chiefs' courts may originate from lower customary courts or internally within the Chief's Court itself. Internal appeals are possible because the Chief's Court usually consists of chiefs of different ranks with differing sentencing powers. Those cases tried by chiefs of a rank lower than the Chief or Deputy Chief namely Senior Chief's representative and Chief's representative are appellable internally, otherwise cases proceed to Customary Court of Appeal (Section 41(2) Customary Courts (Amendment) Act). An inspection of court

registers at Kanye and Mochudi revealed that the overwhelming majority of criminal cases, from 70% upwards, were tried by Chiefs' Representatives.

Notwithstanding differences in geographic reach on the overall numbers, differences in the substantive jurisdiction of the courts clearly had an impact on the distribution of offences overall as well as on the relative proportion of one offence group as against others tried in a particular type of court. The most common offences tried in magistrate courts were motor vehicle-related offences (18.4% of all offences) while in customary courts the dominant offence group was assault-related offence (32.1%). The former group of offences are not triable in customary courts while the latter are triable-either-way. Not only did customary courts not have sufficient/enough powers to try these offences but they were prohibited from doing so (Section 12 Customary Courts Act). However, it was evident from the case register and case records that customary courts sometimes exceeded their jurisdiction by trying cases that were not triable there, perhaps out of ignorance or defiance.

Other fairly common offences triable in magistrate courts but not in customary courts were rape, and armed robbery. The common denominator among offences excluded from the jurisdiction of customary courts is that they generally tended to be offences of a serious nature.

While offence seriousness was probably the main consideration in allowing or denying jurisdiction to customary courts, it was certainly not the only consideration. Customary courts do try two serious offences, namely, stock theft-related and drugs-related offences in respect of which they have been granted extra-ordinary jurisdiction. In terms of these exceptional powers customary courts can send offenders away for up to ten years. Thus, customary courts have been granted extra-ordinary jurisdiction despite the

seriousness of these offences (as judged by the penalties they attract) and the government's apparent misgivings about the technical competence of chiefs and headmen (Republic of Botswana 1971(a)). A number of arguments have been put forward to justify extending to customary courts powers to try stock theft cases. First, it has been argued that customary courts are well versed in matters relating to cattle ear-markings based on family groups and, colour. In fact, Tswana colour codes have been adopted in magistrate courts even though the language of magistrate courts is English, supposedly for the convenience of parties but more likely because Tswana descriptions are more precise and abbreviated than English ones. The Tswana adjectives used to describe colour(s) incorporate colour and sex e.g. a black and white cow is simply *naana* and black and white ox is *nala*. Customary courts are believed to have special expertise in respect of this offence. The second, perhaps more persuasive reason for granting extra-ordinary jurisdiction to customary courts in respect of stock theft is that in Botswana cattle are regarded as a symbol and source of wealth and stature (Schapera 1938). There has always been a feeling among traditionalists that since the majority of ordinary people in the rural areas own cattle, customary courts must therefore be allowed to try stock theft cases even though the penalties they attract are well beyond the ordinary jurisdiction of these courts. A parallel argument also put forward by some traditionalists and politicians is that magistrate courts do not treat stock theft with the seriousness it deserves, and that accused persons often escape conviction on technicalities (Hansard 1996). Under customary law livestock theft attracted very heavy penalties and the owner reserved the right, amongst other things, to kill the thief if they caught him in the act (Schapera 1938). Penalties for stealing cattle included compensation of the owner for up two times the value of the stolen beast or severe thrashing where the thief was incapable of compensating the owner of the stolen animal(s). In addition to this, a thief might be required to pay a fine to the court in the form of a beast. Even

though there is no written evidence to support the assumption that customary courts are allowed to try drug offences because many of those involved in the drug-related offences include ordinary Batswana who sell or consume marijuana, it is in all probably just such a consideration that motivated the extension of their powers by parliament. Case registers showed that customary courts tried marijuana-related cases but not those involving narcotics.

Further analysis of figures subsumed under the generic category of 'miscellaneous' showed magistrate courts were more likely than customary courts to try multiple offences. An inspection of court registers as well as analysis of census survey data confirmed that whilst it was fairly common to find offenders in magistrate courts charged with anything between five to eight counts, by contrast, in customary courts the upper limit was generally three counts. Even though it was not possible to obtain details showing which of the two police forces handles cases with the highest average number of counts in customary courts, it was nevertheless clear from the results of the analysis undertaken that magistrate courts handled most cases with a large number of counts. Indeed it was this particular factor that caused me to increase the number of variables in the data to accommodate a larger number of counts when it became clear that the average number of counts where multiple charges were preferred tended to be higher in cases going to magistrate courts than those going to customary courts.

Related to this, we also found through a survey of court registers and observations during fieldwork that magistrate courts are more likely to handle cases involving more than three offenders than the other type of court. The majority of cases coming before customary courts involving more than one offender usually involved two offenders and very rarely three to four offenders. In contrast, magistrate courts sometimes tried cases involving

up to eight offenders. To that extent, it is justified to conclude that the number of charges/offenders involved in a case is probably one of the factors that Botswana Police take into account when they consider an appropriate trial court for a particular offender.

Cases involving multiple charges/offenders are more likely than the average case to be complicated. Furthermore, if a case involving multiple offenders is sent to a customary court for trial, if one of the accused persons should elect to exercise his/her right to be represented by a lawyer then the case might have to be transferred to the magistrate court. It therefore, makes sense to send such cases to magistrate courts for trial in order to avoid delays in processing them. While the right to legal representation is guaranteed under the Constitution, lawyers are not allowed to represent their clients in proceedings before customary courts, hence the transfers. In practice, only less than a dozen cases were transferred to the magistrate courts annually. The overall number of cases transferred during the period 1991 – 2001 was less than fifty. The majority of transferred cases involved stock theft. This is not surprising because stock-theft has always attracted heavy penalties, and since 1996, it has carried mandatory minimum sentences for first time and second time offenders. Common assault and assault occasioning bodily harm together constituted another major group of cases transferred from customary to magistrate courts. These offences are fairly serious in that they may result in a lengthy prison term for the offender if convicted. Another fairly large category of offences transferred were low level social disorder offences namely common nuisance and related offences. Despite being low level offences these may result in prison sentences.

Theft-related offences provide an interesting contrast to other offences in that they ranked amongst the top four offences tried in both customary and magistrate courts probably indicating the prevalence of common theft

generally, relative to other offences. But burglary, which is often accompanied by theft, was tried mostly in magistrate courts.

The decisive factor in terms of choice of forum by the police in such cases may have been the potential value of items involved or it may simply have been the seriousness of the offence itself or the potentially complex nature of the case. Those where finger print experts might have to be called to give evidence would almost certainly have been tried before a magistrate. It was also clear from the patterns that within any given general offence category, magistrate courts tended to try higher level offences than customary courts. Thus all other things being equal, the higher an offence was ranked within a given band of offences, the more likely it was that it would be tried in the magistrate courts. By logic it becomes correspondingly more important for the presiding officer to have more sentencing powers so that it is arguable that it is the seriousness of the offence which becomes the decisive factor in such instances. Seriousness in this case refers to differentiation of offences based on the maximum level of punishment an offence of that kind would be likely to attract relative to other offences in the same broad offence category.

The police may decide on the basis of the facts of the case that it is likely to attract serious penalties and that customary court judges may not have sufficient sentencing powers to impose the penalty the police believe is appropriate in that instance, so may decide to take it to a magistrate court for trial.

On the other hand it is evident that certain types of offences amongst the least serious nevertheless featured amongst the top four offences tried before customary courts. These were offences against morality and nuisance-related offences which ranked third and fourth respectively in list of offences most likely to be tried in customary courts. An analysis of the distribution of

offences by type of court shows that common nuisance and riot related cases were the most likely of any triable-either way offences to be tried before the Chief's Court. Overall figure for the ten year period covered by the study indicate that while customary courts tried over nine hundred such cases, magistrate courts tried only about twenty. Botswana Police and the Local Police informed the researcher that they had an informal arrangement between themselves and the customary courts whereby the former were encouraged to send certain types of cases to customary courts for trial (see Chapter Seven). The police were asked to send cases involving young offenders in particular and those involving social disorder offences, generally. Cases involving young persons/the youth are considered particularly suitable for trial in customary courts as they are more likely to receive strokes there than in magistrate courts for such offences. Social disorder offences are defined here as those offences involving disturbance to peace and status offences. These include assaults, affray, and various types of nuisance-related offences such as use of insulting language. Statistics suggest that customary courts dealt with a disproportionate amount of cases involving minor assaults and other social disorder offences like common nuisance. These offences have several notable features. First, the parties involved in many of these cases were usually relatives, neighbours or friends. It was not unusual for such cases to be withdrawn before or during the course of the proceedings. Interestingly the complainant would sometimes state that what s/he really wanted was for the parties to be reconciled with one another (see Chapter Six). Customary courts tended to incorporate this in their approach to cases. In magistrate courts the procedure was somewhat different in that the prosecution must make an application for the matter to be withdrawn and for parties to be reconciled (Aquah-Dadzie and Sechele 2000:71) This may explain why many people report such offences to the Local Police instead of the national police .

In cases involving use of insulting language complainants may well consider that some of the insults might not make sense to a magistrate court where English is the language of the court. Besides, the magistrate might be a foreigner who might well not appreciate the insulting nature of the language used. It appeared from the interviews I conducted and other sources that low level social disorder was one of the issues customary courts liked to focus on because they saw it as a sign of decay of the social fabric of tribal communities.

Arrangements to channel particular types of cases to customary courts may reflect community concerns. Where it appears that government institutions are ineffective in relation to crime control, communities tend to revert to chiefs and customary courts to tackle the problem. This happens regularly when communities feel threatened by youth gangs, for instance. Some communities have been known to revert to age regiments after losing confidence in the police (Letsididi 2001; Sekokonyane 2001).

Sometimes the pressure to have certain cases tried in customary courts reflects not only local opinion but that of the nation as a whole (see Hansard 1996) . Cases involving stock theft are a case in point.

While the decision to consistently send certain types of cases triable in either type of court to a particular court may be influenced by existing arrangements between the police and customary courts, but there may be other considerations beyond this. Such decisions may also be influenced by the police's perceptions regarding the normative values and practices of the courts. They probably decide where to take a case based on the predictions they make concerning how a particular type of court is likely to deal with certain offences/ offenders (see Baillie 1969; Kirby 1985).

Baillie (1969) and Kirby (1985) have suggested that the police are more likely to send a case to a customary court if evidence available is too weak to withstand the rigours of a magistrate court. As indicated earlier, this was confirmed by police prosecutors as one of the reasons why they take certain minor cases to customary courts for trial. Even though I did not obtain direct evidence to support this particular claim, it is probably true given that procedures in the customary courts are less elaborate than those applicable in magistrate courts. In fact, Section 49 of the CCA allows customary courts to follow customary law in relation to those aspects of procedure that are not covered by the Customary Courts Procedure Rules. As data on interviews (Chapter Seven) and court observation (Chapter Six) suggests, trial in a customary court probably means technical defences that may be available to a defendant in a magistrate court under the Criminal Procedure and Evidence Act are not available to a defendant in the former. It is therefore, plausible that Botswana Police would naturally want to take advantage of the more relaxed rules of evidence applicable in customary courts in order to secure a conviction in weak cases (Kirby 1985).

One of the critical factors in determining whether a case would be tried in a magistrate or customary court was whether it was reported to Botswana Police (BP hereafter) or the customary court-based Local Police (LP hereafter). The latter operate from and only handle matters reported to the customary court to which they are assigned. They are not allowed to prosecute cases in magistrate courts even though investigators are allowed to play their part as prosecution witnesses where a case has been transferred from a customary to a magistrate court. In contrast, Botswana Police is a national rather than a local force. Unlike Local Police, they are not attached to a particular court even though they tend to do most of their business with the customary and magistrate courts within given geographical areas.

For reasons outlined above, all cases reported to the Local Police at the chief's court are tried there save for those that are transferred to the magistrate court. As noted earlier, no more than a dozen or so a year cases were transferred to magistrate courts at Kanye or Mochudi. Botswana Police has the discretion to take any criminal matter that is triable-either way to any court whether customary or magistrate subject to jurisdictional limits of the court concerned and having regard to the seriousness and complexity of the case. At the time of the study they handled almost all prosecutions in the Magistrate courts. But the fact that the majority of cases that come before customary courts are brought by the Local Police further distorts the picture with regard to offences triable in either court. Firstly unlike Botswana Police, Local Police have not been appointed by the Attorney General to prosecute cases on his behalf, which means that they can not take their cases to magistrate courts. So, all the cases handled by the Local Police are tried only in customary courts. Secondly, because the Local Police are based in the customary court complex, and are in effect, the tribal police may well have implications for the type of cases that find their way into the customary courts. Because of their relationship with customary courts, the types of cases they focus on may well reflect the anti-crime agenda of the Chiefs and their communities.

5.3.9 Explaining Trends: Cases Involving Offences Triable-Either-Way

Factors discussed so far, are not on their own sufficient to explain changes in the volume and the distribution of particular offences and offence groups in customary and magistrate courts over the years, relative to other offences triable-either way. Other factors, some transient and others structural or systemic, and possibly in some cases the net result of the interaction between these, may provide a better explanation of trends. However, all these factors, including those alluded to earlier, are not always different and distinct from

more transient factors. The same can be said for their effects. Some are, however, sufficiently strong to register on the national radar. The response to such factors may in turn be conditioned by the orientation of the particular institution or type of institution, courts included. An example of transient phenomenon which provoked sharp but varying responses from modern state institutions and those associated with the traditional indigenous structures is the phenomenon of peri-urban youth gangs which emerged in the early 1990's, and resurfaced again in some of these centres in the late 1990's. Even though not all factors that account for this increase are known, the emergence gangs of out of school youths in the major villages around Botswana around 1995 may explain the jump in assault figures (Okavango Observer 1995). These gangs engaged mostly in intimidation and assaults. Kanye, Molepolole and Maun emerged as the areas in which the gang activity was most widespread. Traditional authorities seem to have been more concerned about gang activity than the general courts, which like other 'government institutions' were perceived as having failed to effectively contain gang activity (Letsididi 2001). Traditional authorities saw this as a problem of social disorder, more specifically, youth disorder.

However, it is important to consider each shift in its proper context as these shifts are a matter of degree and their significance or otherwise in the present analysis depends on the level and direction of the shift. There are three levels here, namely, 1) all offences, 2) those triable-either-way or 3) a subgroup of either of these, but most likely in the present analysis, a subgroup of the triable-either way group of offences. It would probably take a massive increase in the volumes of other offences or groups of offences for an offence which may have increased in real terms to register a diminution in proportional/relative terms. All other things being equal, an upward trend of that nature may be an indicator of real rather than apparent changes

despite an apparent decline in the offence or offence group we may be focusing on.

5.3.10 Findings: Distribution of Offences

Finding5A1: There were differences in the distribution of offences by court, generally.

Finding 5A2: There were significant differences overall in terms of volume, and in terms of relative proportions of triable-either-way offences processed by magistrate and customary courts as postulated in H2. These differentials could neither be attributed to differences in the substantive jurisdictions of the two courts alone nor to chance. Processing of lower-end criminal cases was dominated by customary courts while serious offences, including middle to top-end triable-either-way offences were most likely to be tried in a magistrate courts.

Finding5A3: The distribution of some offences, such as nuisance-related offences, was highly skewed as thus confirming non-directional hypothesis H2.

5.3.11 Conclusion

The findings A1-A3 confirm non-directional hypothesis H1 on the distribution of offences, which postulated that there would be differences in the distribution of offences between customary and magistrate courts, generally. The distribution suggests that a variety of inter and intra-system factors beyond the expected one of jurisdiction, were at play

SECTION B

5.4 Introduction

In this section I consider general outcome patterns, sentencing patterns and frequency of use of different types of punishment across offences. I used cumulative data about case processing decisions around cases whatever

stage they might have reached, to help build a more complete picture of case processing in the two types of court.

The presentation and analysis in this section was intended to address hypothesis 2 and 2A (H2-2A):

(a) *Hypothesis 2*: There should generally be variations in the outcome of triable- either-way offences registered for trial in customary courts *viz-a-viz* those registered for trial in Magistrate courts.

(b) *Hypothesis 2A*: There should generally be variations in both sentencing patterns of customary and magistrate courts in terms of sentencing outcomes for triable- either-way offences and regarding the most frequently deployed punishment(s) by each type of court overall.

5.4.1 A Note on Disposals, Sentencing Patterns and Uses of Punishments

In this section I present results on the disposal of cases registered for trial in customary and magistrate courts. Disposal, as used here, encompasses all outcomes of cases regardless of whether or not they proceeded to the sentencing stage, so that in effect, it includes withdrawals, pending cases and acquittals/convictions. Even though the present section focuses mainly on sentencing patterns and trends, on their own these can only provide us with a partial understanding regarding what happens to cases involving different offences or offence groups once they have entered the court system. To obtain a more complete picture concerning outcomes of the justice process in customary and magistrate courts, it became necessary to extend the scope of analysis beyond sentencing. In that way I was able to capture what happened to those cases that did not reach sentencing stage. Thus, in this section we consider disposals generally, sentencing patterns and uses of punishments in relation to particular offences.

Sentencing patterns as used here refers to the apparent trends suggested by the aggregation of figures relating to outcomes in respect of particular offences or offence categories that have been tried up to conviction and sentencing stage. In that context, I consider which punishments are more likely to be imposed in respect of various offences/offence as categorized under various classification schemes formulated and/or adopted for purposes of this study. More generally, I consider which punishments were cumulatively the most frequently used regardless of whether such punishments ranked among the top three or so of most frequently deployed penalties in respect of the identified offence categories. Cumulative figures could possibly indicate likelihood of a particular court to impose a particular penalty. Even though a penalty may not feature amongst the top three or five most frequently awarded punishments in respect of categories identified for analysis in this section, it may, in cumulative terms, be the penalty that a particular court is likely to impose, generally.

As suggested above, a number of offence classification schemes were constructed or adopted in order to facilitate analysis and illuminate the relationship between disposals and offences/offence groups. The first classification scheme was based on the division of offences into Property Offences and Offences Against the Person, a universally understood and frequently used offence classification scheme in the common law world. The second schema, much narrower than the first, was based on what I have defined as Social Disorder Offences. This category of offences consisted of a number of offences in the Offences Against the Person categories and a variety of Nuisance offences such as common nuisance and use of insulting language. The third approach was based on groups that brought together subgroups of offences of larger offence categories used in the Penal Code. These subgroups included into offences such as Assault-related Offences,

Burglary and Related Offences, Nuisance-Related Offences and Malicious Damage to Property.

The distribution of cases by court type observed in the preceding sections also influenced the decision to explore further certain aspects of data in this section. Because variations in the clustering of triable-either-way offences may be assumed to reflect to a greater or lesser extent the focal concerns of a particular court type, it was logical that we should explore further emerging patterns and trends to find out whether any more differences or similarities would emerge in relation to the disposal or punishment of those offences. For reasons of space, however, this section focuses for the most part on top-end figures concerning the relationship between punishments and type of offence. Where, as was the case in the majority of instances, the distribution of middle range and lower-end figures was evenly but thinly spread it was clear that meaningful comparisons could not be made, I focused only on top-end figures. But where the distribution of a particular offence group or penalties was heavily skewed such that a particular offence/offence group was overwhelmingly tried either in a customary or magistrate court or particular punishment(s) combinations were levied exclusively or almost exclusively by a particular court type, it was crucial to examine these more closely.

5. 4.2 Presentation of Results

5.4.3 Disposals for Offences Against the Person and Offences Relating To Property: All Courts

The combined figures (Table 5 below) for both courts show that the top five disposals in respect of all offences in the categories designated Property Offences and Offences Against the Person were the fine at 16.5% withdrawals at 16% strokes at 12.3%, imprisonment at 7.9% and acquittals at 6.7%. However, statistics also indicate that there were differences in the way

the two types of court disposed of cases from these two major offence categories.

Disposal patterns varied by offence group. The leading disposal for OAPs was the fine at 22.9% followed by withdrawals and strokes at 18% and 17.2% respectively. In contrast the main disposal for ORPs was withdrawals at 14.1%, imprisonment at 11.9% and the fine at 10.2%.

Table 5: Disposals OAPs and ORPs- General (All Courts)

	Type of offence					
All courts	**Offences against the person**		**Offences relating to property**		**Total**	
Type of disposal	**N**	**%**	**N**	**%**	**N**	**%**
Strokes	429	17.2	195	7.5	624	12.3
Fine	572	22.9	265	10.2	837	16.5
Imprisonment	95	3.8	309	11.9	404	7.9
Compensation	4	0.2	37	1.4	41	0.8
Committed to high court	54	2.2	7	0.3	61	1.2
Transferred	14	0.6	15	0.6	29	0.6
Reviewed	13	0.5	29	1.1	42	0.8
Withdrawn	449	18.0	365	14.1	814	16.0
Property restored	0	0.0	3	0.1	3	0.1
Reconciliation	44	1.8	18	0.7	62	1.2
Acquitted & discharged	132	5.3	211	8.2	343	6.7
Cautioned/warned	1	0.0	3	0.1	4	0.1
Disqualified	0	0.0	1	0.0	1	0.0
Community service	16	0.6	12	0.5	28	0.6
Pending	23	0.9	29	1.1	52	1.0
Fine& disqualified	2	0.1	1	0.0	3	0.1
Fine & imprisonment	1	0.0	7	0.3	8	0.2
Strokes & Imprisonment	28	1.1	79	3.1	107	2.1
Strokes & compensation	13	0.5	107	4.1	120	2.4
Strokes, Fine & Compensation	0	0.0	6	0.2	6	0.1
Abscond	3	0.1	1	0.0	4	0.1
Strokes & fine	53	2.1	39	1.5	92	1.8
Compensation& imprisonment	0	0.0	30	1.2	30	0.6
Case closed	2	0.1	0	0.0	2	0.0
Fine & compensation	22	0.9	184	7.1	206	4.1
Fine & compensation	3	0.1	1	0.0	4	0.1
Fine, Compensation &Imprisonment	2	0.1	2	0.1	4	0.1
Fine & Community service	8	0.3	2	0.1	10	0.2
Fine, community service & Compensation	0	0.0	2	0.1	2	0.0
Stroke_, Compensation & imprisonment	1	0.0	17	0.7	18	0.4
Stroke fine and compensation	0	0.0	1	0.0	1	0.0
Imprisonment and CDO	0	0.0	28	1.1	28	0.6

Strokes and community service	4	0.2	2	0.1	6	0.1
Strokes, imprisonment, suspended imprisonment	5	0.2	24	0.9	29	0.6
Imprisonment, suspended imprisonment	107	4.3	127	4.9	234	4.6
Strokes and probation	2	0.1	6	0.2	8	0.2
Fine, imprisonment, suspended imprisonment	7	0.3	4	0.2	11	0.2
Imprisonment, suspended imprisonment & compensation	2	0.1	6	0.2	8	0.2
Imprisonment, suspended imprisonment, strokes and imprisonment	1	0.0	4	0.2	5	0.1
Missing	184	7.3	227	8.7	411	8.0
Other	198	7.9	182	7.0	380	7.5
Total	2494	100.0	2588	100.0	5082	100.0

Source: General survey

But as Table 6 and Table 7 below show, the pattern for OAPs and ORPs in magistrate courts was different from that of customary courts. Overall, the overwhelmingly dominant disposal in the magistrate courts in respect of both offence groups was withdrawals which stood at 22.8% well above the second most common disposal namely, acquittals which stood at 14.7%. and was closely followed by the combination punishment of imprisonment and suspended imprisonment at 13.6% and imprisonment at 12.7% respectively.

Withdrawals dominated disposals for OAPs (22.3%) followed the by the combination of imprisonment and suspended prison term (12.7%), acquittals at 12.5% and committal to high court for sentencing (10.4%). In the ORP category the main disposal was also withdrawals (23.2%), acquittals were second at 16% while imprisonment and the imprisonment/suspended imprisonment combination followed at 14.6% and 14.2% respectively.

Table 6: Disposals OAP and ORP- Magistrate Courts

	Type of offence					
Magistrate	**Offences against the person**		**Offences relating to property**		**Total**	
Type of disposal	**N**	%	**N**	%	**N**	%
Strokes	5	1.0	11	1.2	16	1.1
Fine	17	3.3	23	2.6	40	2.8
Imprisonment	49	9.4	130	14.6	179	12.7
Compensation	3	0.6	2	0.2	5	0.4
Committed to high court	54	10.4	7	0.8	61	4.3
Transferred	0	0.0	1	0.1	1	0.1
Withdrawn	116	22.3	207	23.2	323	22.8
Property restored	0	0.0	1	0.1	1	0.1
Reconciliation	25	4.8	9	1.0	34	2.4
Acquitted and discharged	65	12.5	143	16.0	208	14.7
Cautioned/warned	1	0.2	3	0.3	4	0.3
Fine and imprisonment	1	0.2	6	0.7	7	0.5
Strokes and Imprisonment	5	1.0	29	3.2	34	2.4
Strokes and compensation	0	0.0	1	0.1	1	0.1
Strokes and fine	0	0.0	2	0.2	2	0.1
Compensation and imprisonment	0	0.0	2	0.2	2	0.1
Fine and compensation	0	0.0	4	0.4	4	0.3
Strokes, imprisonment, suspended imprisonment	5	1.0	24	2.7	29	2.1
Imprisonment, suspended imprisonment	66	12.7	127	14.2	193	13.6
Strokes and probation	2	0.4	6	0.7	8	0.6
Fine, imprisonment, suspended imprisonment	7	1.3	4	0.4	11	0.8
Imprisonment, suspended imprisonment and compensation	2	0.4	6	0.7	8	0.6
Imprisonment, suspended imprisonment, strokes and imprisonment	1	0.2	4	0.4	5	0.4
Missing	89	17.1	112	12.5	201	14.2
Other	8	1.6	29	3.2	37	2.6
Total	521	100.0	893	100.0	1414	100.0

Source: General survey data

5.4.4 Customary Court Disposals for OAPs and ORPs

Overall the fine was the main disposal for both OAPS and ORPs in the customary courts. It topped the figures at 21.7%, followed by strokes at 16.6% and withdrawals 13.4%. The fine was the leading disposal for OAPS (28.1%),

followed by strokes 21.5% and withdrawals (16.9%).With regard to ORPs the main disposal was also the fine at 14.3% closely followed by strokes at 10.9% and imprisonment at 10.6%.

Table 7: Disposals OAP and ORP: Customary Courts

	Type of offence					
Customary	**Offences against the person**		**Offences relating to property**		**Total**	
Type of disposal	**N**	**%**	**N**	**%**	**N**	**%**
Strokes	424	21.5	184	10.9	608	16.6
Fine	555	28.1	242	14.3	797	21.7
Imprisonment	46	2.3	179	10.6	225	6.1
Compensation	1	0.1	35	2.1	36	1.0
Transferred	14	0.7	14	0.8	28	0.8
Reviewed	13	0.7	29	1.7	42	1.1
Withdrawn	333	16.9	158	9.3	491	13.4
Property restored	0	0.0	2	0.1	2	0.1
Reconciliation	19	1.0	9	0.5	28	0.8
Acquitted & discharged	67	3.4	68	4.0	135	3.7
Community service	16	0.8	12	0.7	28	0.8
Pending	23	1.2	29	1.7	52	1.4
Fine and imprisonment	0	0.0	1	0.1	1	0.0
Strokes & Imprisonment	23	1.2	50	2.9	73	2.0
Strokes & compensation	13	0.7	106	6.3	119	3.2
Strokes, Fine & Compensation	0	0.0	6	0.4	6	0.2
Abscond	3	0.2	1	0.1	4	0.1
Strokes & fine	53	2.7	37	2.2	90	2.5
Compensation & imprisonment	0	0.0	28	1.7	28	0.8
Case closed	2	0.1	0	0.0	2	0.1
Fine & compensation	22	1.1	180	10.6	202	5.5
Fine & Compensation	3	0.2	1	0.1	4	0.1
Fine, Compensation & Imprisonment	2	0.1	2	0.1	4	0.1
Fine & Community service	8	0.4	2	0.1	10	0.3
Fine, community service & Compensation	0	0.0	2	0.1	2	0.1
Stroke Compensation and imprisonment	1	0.1	17	1.0	18	0.5
Stroke, fine & compensation	0	0.0	1	0.1	1	0.0
Imprisonment & Compensation	0	0.0	28	1.7	28	0.8
Strokes and community service	4	0.2	2	0.1	6	0.2
Imprisonment & suspended imprisonment	41	2.1	0	0.0	41	1.1
Missing	94	4.8	115	6.8	209	5.7
Other	192	9.8	155	9.1	348	9.5
Total	1973	100.0	1695	100.0	3668	100.0

Source: General survey data

5.4.5 Disposals: Selected Offences

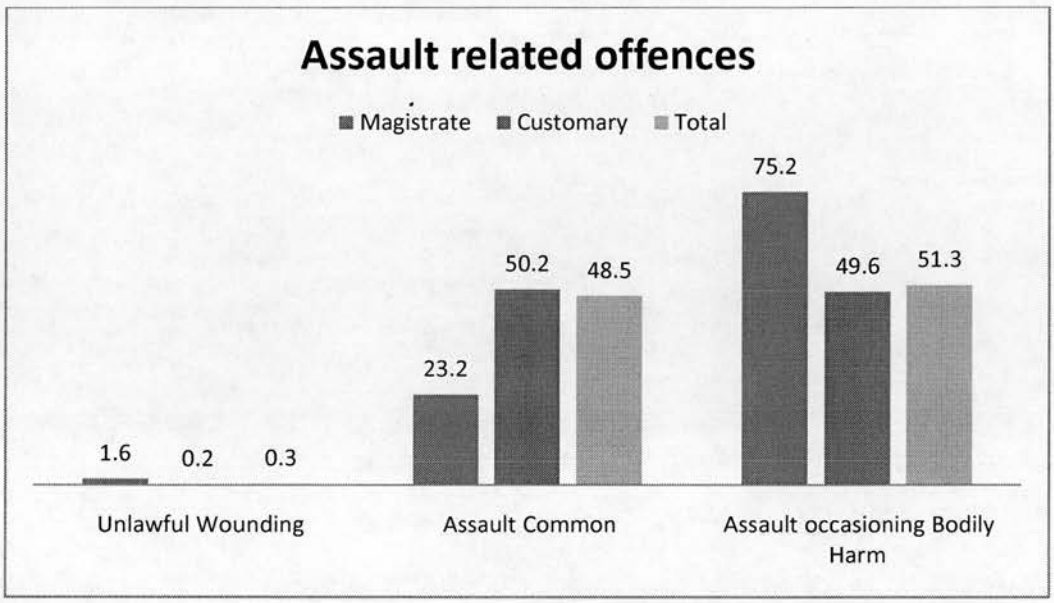
This section presents disposals for selected offences namely assault-related offences, burglary and related offences, theft-related offences, malicious damage to property, nuisance–related offences and multiple offences. Even though the main concern here was disposals, we provide a breakdown of figures for the different categories of offences before presenting disposals for the particular offence group.

Assault-related Offences

According to Figure 4 assault common (50.2%) dominated business in this category in the customary courts though assault occasioning bodily harm was a close second (49.6%). In the magistrate assault occasioning actual bodily harm was the overwhelmingly dominant offence (75.2%).

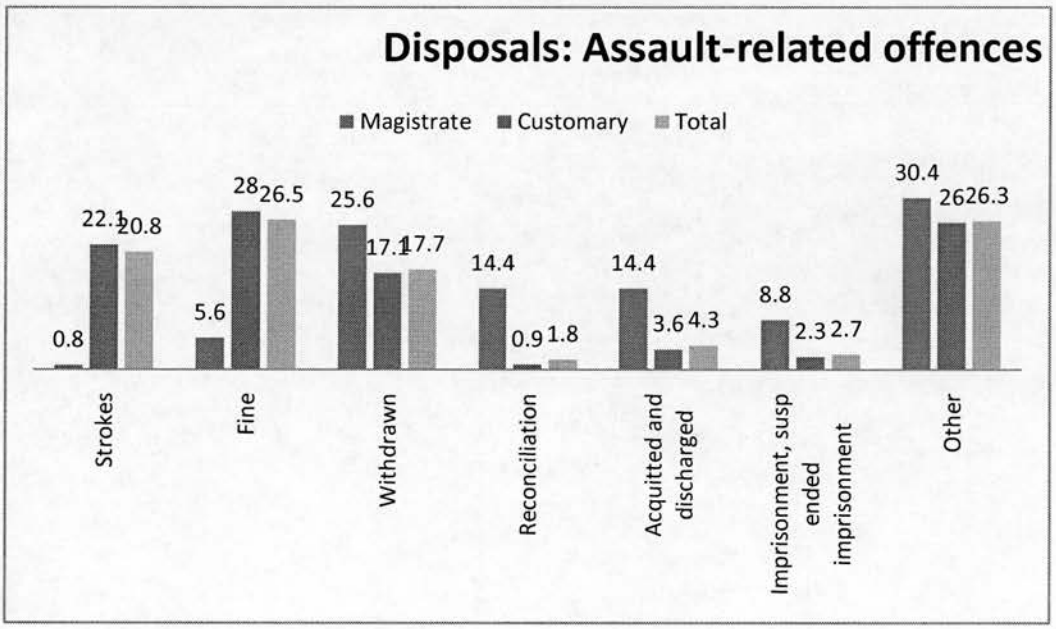
Figure 5 below shows that the fine was the most common disposal (28%) customary courts for assault related offences. It was followed by strokes at 22.1 % and withdrawals at 17.1%. In magistrate courts withdrawals (25.6%) were far and away the most common disposal for assault-related offences followed by acquittals and reconciliation at represented 14.4% each.

Figure 4: Breakdown: Assault related offences



Source: General survey data

Figure 5: Disposals: Assault-related offences



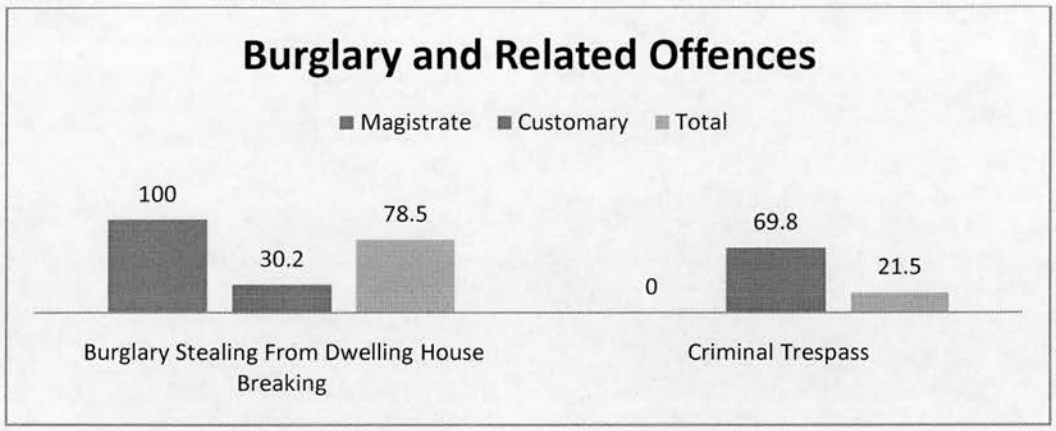
Source: General survey data

Burglary and Related Offences

According to Figure 6 burglaries, stealing from dwelling and house breaking were the only offences in this group that occupied the magistrate courts. In contrast customary courts mostly tried criminal trespass (69.8%) while the rest belonged to the burglary, stealing from dwelling and house-breaking sub-group.

Overall the most likely disposal for burglary-related offences were withdrawals (21.2%) imprisonments and suspended prison terms (13.3%), imprisonment (9.5%)(see Table 8). The odds were that anyone who was convicted of burglary was most likely to suffer a punishment in which prison featured in one form or another (that is full, suspended or as back up to a fine). Altogether imprisonment featured in the majority of the punishments. Thus disposals in which full imprisonment played a role were overall the dominant disposals and exceeded even withdrawals. If we ignore withdrawals for the time being, the other punishment apart from imprisonment a person convicted of a burglary-related offence was more likely to receive would include strokes. In customary courts offenders were almost as likely to receive a fine (19.8%) as they were to receive strokes (19%). The next most common disposals after these were withdrawals (13.8 %.). Withdrawals and imprisonment (full term and suspended) were by far the most common disposals in respect of this group of offences in magistrate at 24.5% and 19.2% respectively.

Figure 6: Burglary and Related Offences



Source: General survey data

Table 8: Disposals: Burglary-related Offences

	Magistrate		Customary		Total	
Type of disposal	**N**	**%**	**N**	**%**	**N**	**%**
Strokes	5	1.9	22	19.0	27	7.2
Fine	1	0.4	23	19.8	24	6.4
Imprisonment	25	9.6	11	9.5	36	9.5
Compensation	0	0.0	2	1.7	2	0.5
Transferred	1	0.4	0	0.0	1	0.3
Reviewed	0	0.0	1	0.9	1	0.3
Withdrawn	64	24.5	16	13.8	80	21.2
Reconciliation	0	0.0	3	2.6	3	0.8
Acquitted and discharged	17	6.5	8	6.9	25	6.6
Cautioned/warned	1	0.4	0	0.0	1	0.3
Community service	0	0.0	1	0.9	1	0.3
Pending	0	0.0	1	0.9	1	0.3
Fine and imprisonment	1	0.4	0	0.0	1	0.3
Strokes and Imprisonment	21	8.0	4	3.4	25	6.6
Strokes and compensation	0	0.0	4	3.4	4	1.1
Strokes and fine	2	0.8	5	4.3	7	1.9
Fine and compensation	0	0.0	2	1.7	2	0.5
Stroke Compensation and imprisonment	0	0.0	1	0.9	1	0.3
Strokes, imprisonment,	18	6.9	0	0.0	18	4.8

suspended imprisonment						
Imprisonment, suspended imprisonment	50	19.2	0	0.0	50	13.3
Strokes and probation	3	1.1	0	0.0	3	0.8
Imprisonment, suspended imprisonment, strokes and imprisonment	4	1.5	0	0.0	4	1.1
Missing	32	12.3	6	5.2	38	10.1
Other	16	6.1	6	5.2	22	5.8
Total	**261**	**100.0**	**116**	**100.0**	**377**	**100.0**

Source: General survey data

Theft related offences

As far as theft-related offences were concerned business in the magistrate courts was almost evenly distributed between stealing stock at 37.1 % and theft common at 34.3 % with stealing by servant coming third at 16.9 %(See Figure 7). Meanwhile in the customary courts the main offence dealt theft common (61.5 %) followed by stealing stock (20.4 %).

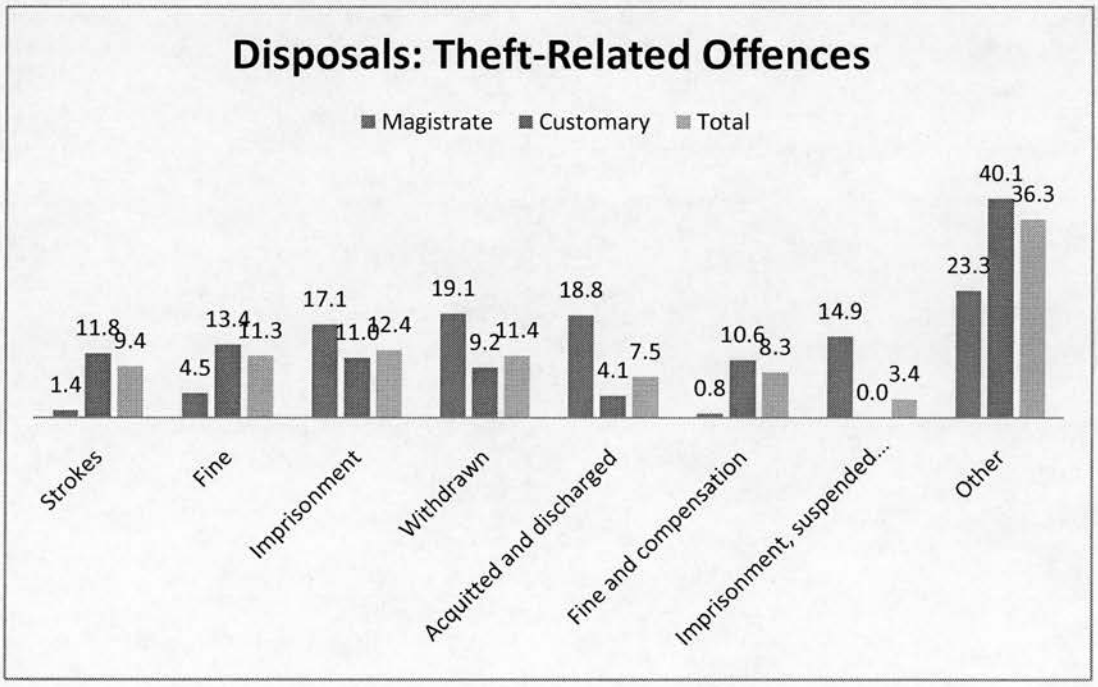
Figure 8 shows that in aggregate terms the most common disposals for theft-related offences were imprisonment (12.4 %), withdrawals (11.4 %) and the fine (11.3 %). However, disaggregated figures show divergences in the patterns of the courts in relation to the elements under discussion in this section. In customary courts the disposals were as follows, fine (13.4 %), strokes (11.8 %) and the combination of fine and compensation (10.6 %.)

Disposal patterns of magistrate courts diverged from those of customary courts. In the former, dominant disposals were withdrawals (19.1%), acquittals (18.8%) and imprisonment (17.1 %). It is evident from foregoing that overall non-sanctions were the pre-eminent disposals in magistrate courts.

Figure 7: Breakdown: Theft-Related Offences

Source: General survey data

Figure 8: Disposals: Theft-Related Offences



Source: General survey data

Malicious Damage to Property

According to Figure 9 malicious injury to property and arson were pretty even in terms of the cases coming before magistrate courts at 52 % and 46% respectively. By comparison customary courts concerned themselves mostly with malicious injury to property (97.7%) and hardly tried any arson cases.

The fine and compensation combination was the dominant disposal (16.5%) for offences relating to damage to property (see Table 9). Withdrawals were the next most frequent disposal (14.3%) for this group followed by the punishment combinations involving strokes and compensation (13.8%) with the rest of disposals used being rather less than these.

For magistrate courts the most common disposals were withdrawals (22 %), imprisonment to full term and the combination of a prison term and suspended prison terms which were on par at 20 % and acquittals (12 %). In contrast the fine and compensation combination was the most common disposal in customary courts at 21.3% followed by stroke and compensation combination at 17.8% and withdrawals at 12.1 %.

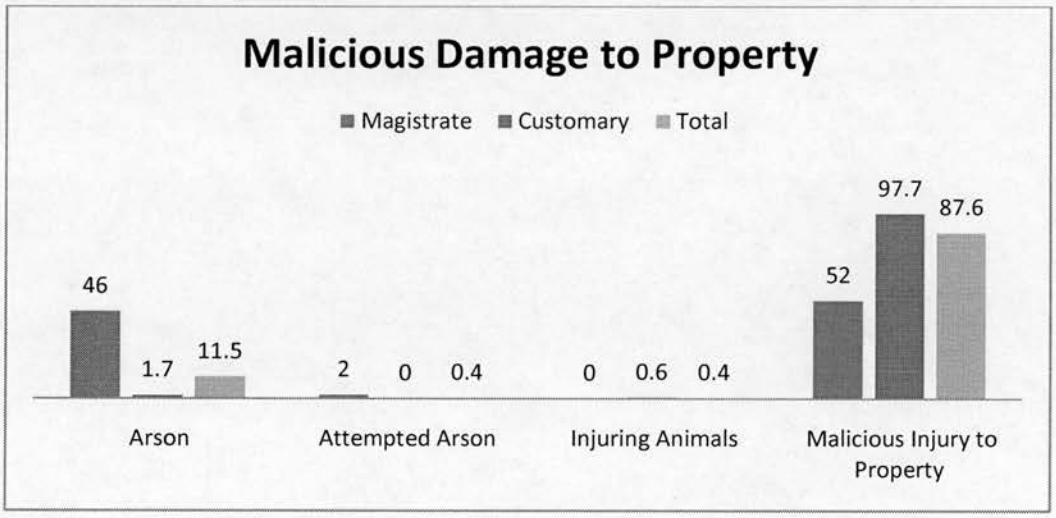
Whereas withdrawals were the most common disposals in relation to MDP for magistrate courts, it was only the third most common for customary courts in/for this category of offences. In aggregate terms a person tried in a magistrate court was most likely to face some kind of prison term if convicted, whether suspended or full term. Taken together suspended and full terms even exceeded withdrawals as the most likely disposals.

Customary courts tended to put emphasis on some sort of fine or compensation or a combination of fine and/or compensation together with some other punishment as the general punishment. However, it was also clear that in comparative terms customary courts were more likely to order

compensation than were magistrate courts, often together with some other punishment. Furthermore imprisonment to full term played a minor role in customary courts while suspended prison terms did not feature at all.

As far as punishments were concerned customary courts used a wide range of punishment combinations for MDP. On the whole the most common elements in most of the punishments imposed by the customary courts were fine and compensation emphasizing restorative aspects in these category offences. In contrast punishments by magistrate courts paid little or no attention at all to the restorative aspects. Taken as a whole punishments imposed by magistrates were at the serious end of the scale and end combination punishments were not much used.

Figure 9: Breakdown: Malicious Damage to Property



Source: General survey data

Table 9: Disposals: Malicious Damage to Property

	Magistrate		Customary		Total	
Type of disposal	**N**	%	**N**	%	**N**	%
Strokes	0	0.0	7	4.0	7	3.1
Fine	1	2.0	11	6.3	12	5.4
Imprisonment	10	20.0	7	4.0	17	7.6
Compensation	0	0.0	11	6.3	11	4.9
Reviewed	0	0.0	5	2.9	5	2.2
Withdrawn	11	22.0	21	12.1	32	14.3
Property restored	0	0.0	1	0.6	1	0.4
Reconciliation	3	6.0	1	0.6	4	1.8
Acquitted and discharged	6	12.0	7	4.0	13	5.8
Community service	0	0.0	1	0.6	1	0.4
Pending	0	0.0	3	1.7	3	1.3
Strokes and Imprisonment	1	2.0	0	0.0	1	0.4
Strokes & compensation	0	0.0	31	17.8	31	13.8
Strokes, Fine & Compensation	0	0.0	2	1.1	2	0.9
Strokes & fine	0	0.0	1	0.6	1	0.4
Compensation & imprisonment	0	0.0	2	1.1	2	0.9
Fine & compensation	0	0.0	37	21.3	37	16.5
Fine & Compensation	0	0.0	1	0.6	1	0.4
Fine, Compensation & Imprisonment	0	0.0	1	0.6	1	0.4
Strokes Compensation & imprisonment	0	0.0	4	2.3	4	1.8
Imprisonment & Compensation	0	0.0	1	0.6	1	0.4
Strokes & community service	0	0.0	1	0.6	1	0.4
Imprisonment& suspended imprisonment	10	20.0	0	0.0	10	4.5
Imprisonment, suspended imprisonment & compensation	1	2.0	0	0.0	1	0.4
Missing	6	12.0	9	5.2	15	6.7
Other	1	2.0	9	5.2	10	4.5
Total	50	100.0	174	100.0	224	100.0

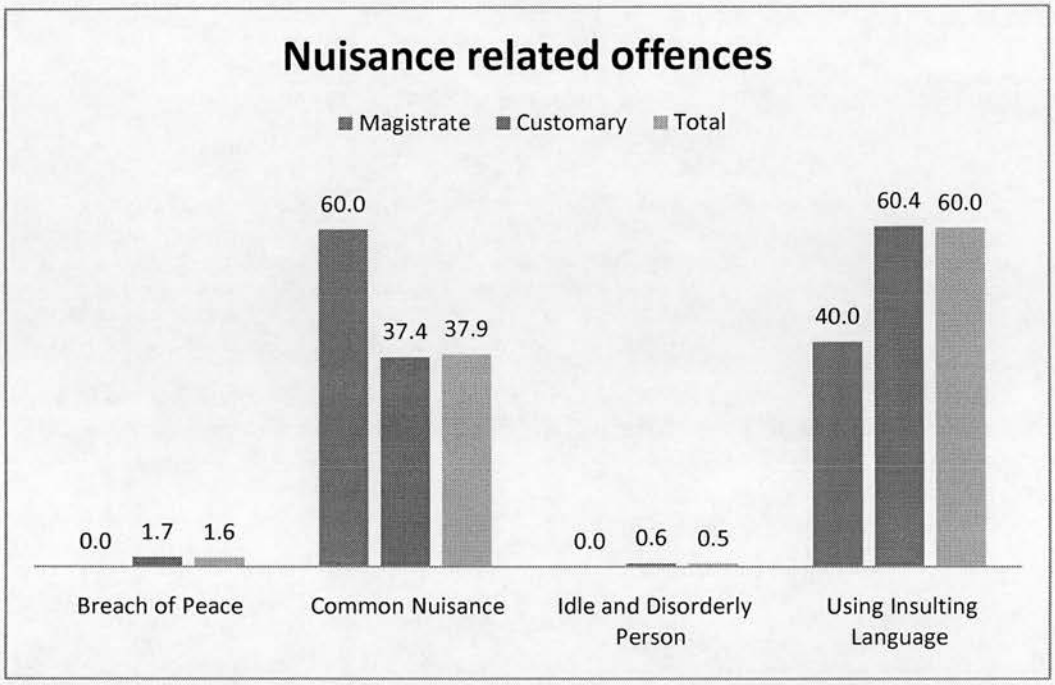
Source: General survey data

Nuisance and related offences

It is evident from the breakdown of figures in Table 10 that nuisance-related offences were overwhelmingly tried before customary courts. Figure 10 shows that in the magistrate courts nuisance offences tended to be divided between common nuisance (60%) and use of insulting language (40%). In customary courts the pattern encompassed a wider range of offences in this category: use of insulting language (60.4%), common nuisance 37.4%, breach of peace 1.7% and idle and disorderly behaviour (0.6%).

Leading disposals for this category of offences were the fine (31.9%), strokes (22.1%) and withdrawals (13.1%). However figures in Table below 10 show that customary courts' disposal patterns were quite different from those of magistrate courts. The fine was the leading disposal in customary courts at 32.1%, followed by strokes at 22.5% and withdrawals at 12.8%. It is interesting to note that customary courts imposed the severest sanction available to lower courts, namely imprisonment, in 1.3 % cases (12 individuals) involving nuisance-related offences. In contrast the main disposals in magistrate courts were acquittals (40%), withdrawals (25%) and the fine (20%).

Figure 10: Breakdown Nuisance related offences



Source: General survey data (NB: Riots not included in this instance)

Table10: Disposals For Nuisance related offences

	Magistrate		Customary		Total	
Type of disposal	**N**	**%**	**N**	**%**	**N**	**%**
Strokes	0	0.0	202	22.5	202	22.1
Fine	4	20.0	288	32.1	292	31.9
Imprisonment	0	0.0	12	1.3	12	1.3
Transferred	0	0.0	8	0.9	8	0.9
Reviewed	0	0.0	6	0.7	6	0.7
Withdrawn	5	25.0	115	12.8	120	13.1
Reconciliation	0	0.0	16	1.8	16	1.7
Acquitted & discharged	8	40.0	54	6.0	62	6.8
Community service	0	0.0	8	0.9	8	0.9
Pending	0	0.0	9	1.0	9	1.0
Fine & imprisonment	0	0.0	2	0.2	2	0.2
Strokes & Imprisonment	0	0.0	4	0.4	4	0.4

Strokes and compensation	0	0.0	1	0.1	1	0.1
Strokes & fine	0	0.0	13	1.5	13	1.4
Compensation &imprisonment	0	0.0	1	0.1	1	0.1
Strokes & compensation	0	0.0	1	0.1	1	0.1
Case closed	0	0.0	1	0.1	1	0.1
Fine & compensation	0	0.0	3	0.3	3	0.3
Fine & Community service	0	0.0	3	0.3	3	0.3
Imprisonment & Compensation	0	0.0	1	0.1	1	0.1
Imprisonment& suspended imprisonment	1	5.0	0	0.0	1	0.1
Missing	1	5.0	36	4.0	37	4.0
Other	1	5.0	112	12.5	113	12.3
Total	20	100.0	896	100.0	916	100.0

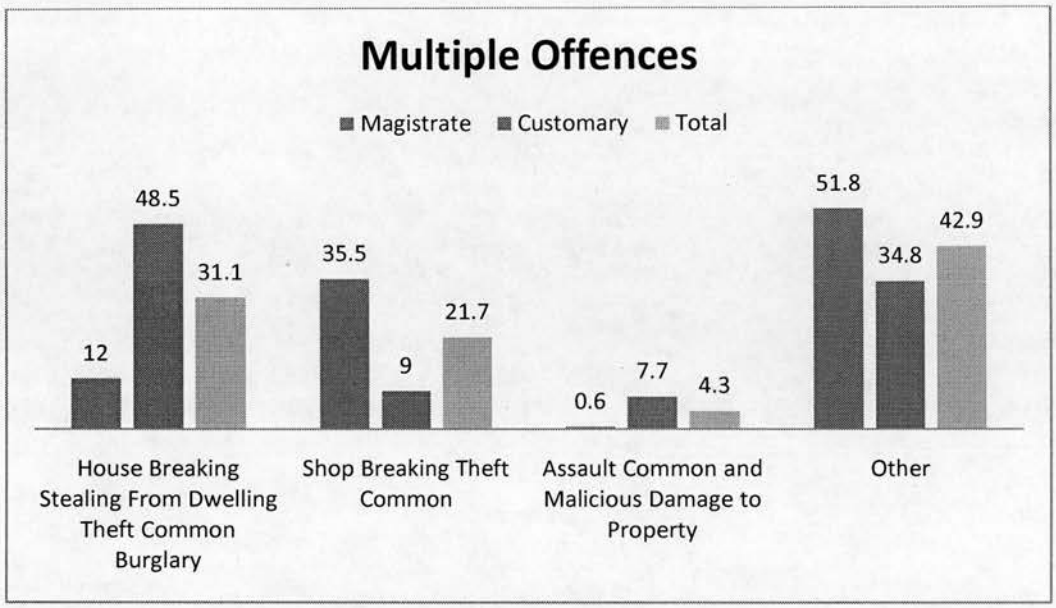
Source: General survey data

Multiple Offences

The most common multiple offences tried in the magistrate courts were those that combined shop-breaking and theft (35.5%) followed by those that combined burglary and theft-related offences (12%)(Figure11). The pattern of the customary courts was the opposite of that of magistrate courts in that the combination of burglary and theft-related offences accounted for 48.5% of multiple offences tried by customary courts while the combination involving shop-breaking and theft common were a distance second.

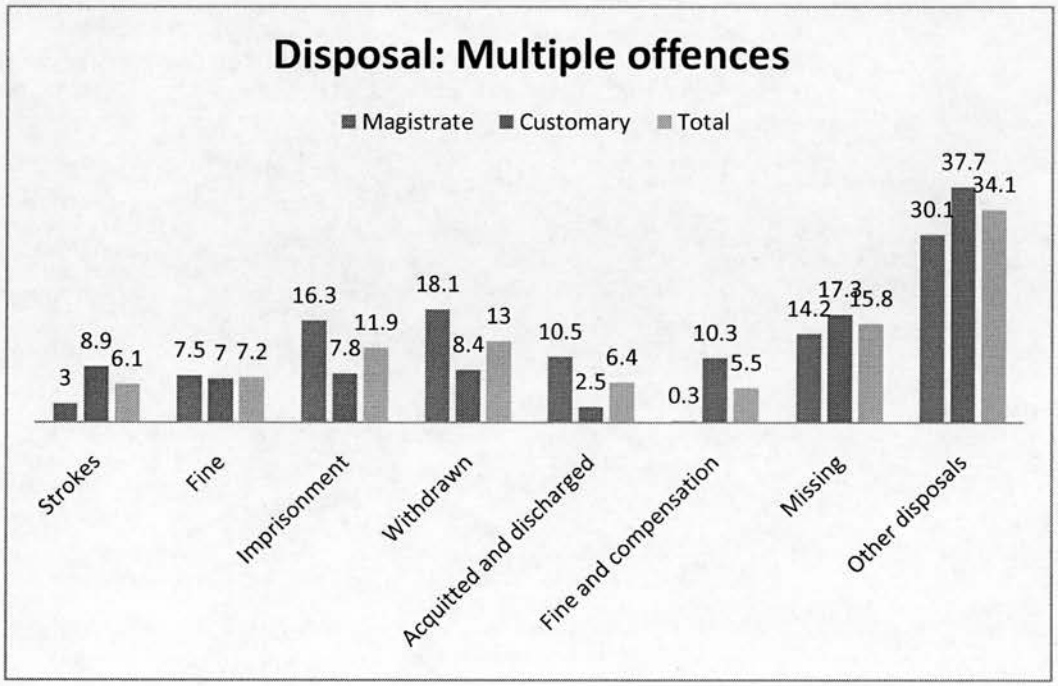
In terms of disposals magistrate courts tended to dispose of multiple offences by way of withdrawals (18.1%), imprisonment (16.3%), acquittals (10.5%) and fines (7.5%) in that order. For customary courts the leading disposals were withdrawals (13%), imprisonment (11.9%), the fine (7.2%) and acquittals (6.4%.)

Figure 11: Multiple Offences



Source: General survey data

Figure 12: Disposal: multiple offences



Source: General survey data

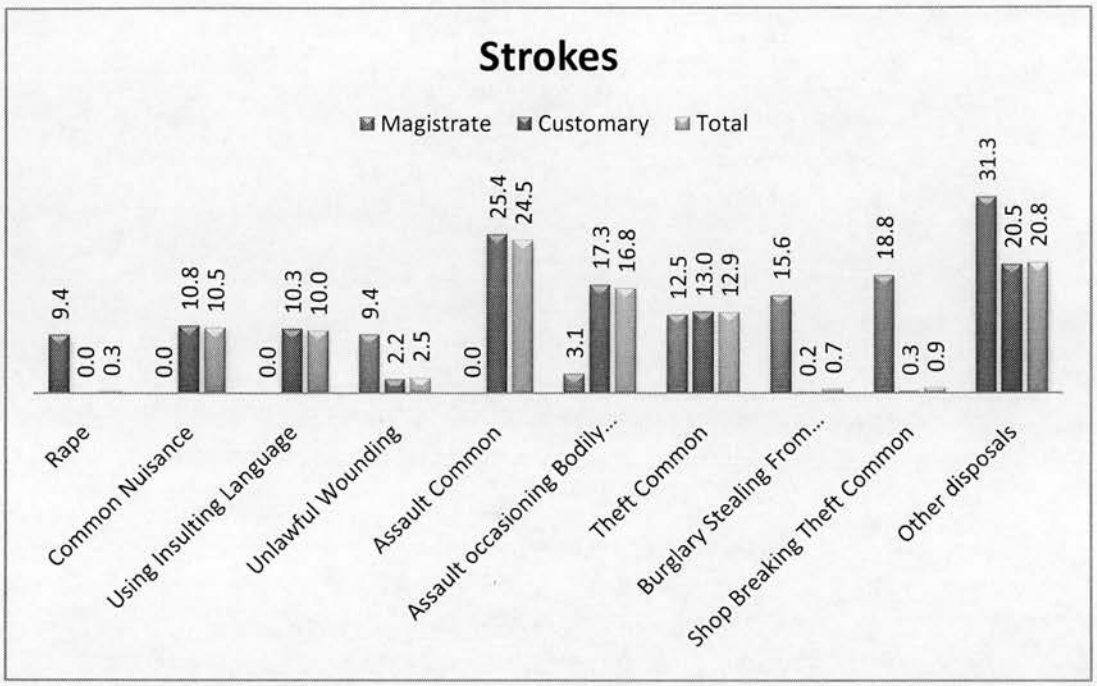
5.4.6 Overall Use of Penalties and Other Disposals

This part of the chapter presents statistics on the use of various penalties and disposals by magistrate and customary courts in relation to different offences.

Strokes

Figures show, that generally, assault-related offences tended to attract strokes than most other offences. Thus, assault common on its own accounted for 24.5% of all strokes awarded for any particular offence while another assault-related offence ranked second at 16.8%. Theft common stood at position three at 12.9 % while common nuisance in fourth accounted for 10.5%. Magistrate courts were most likely to deploy strokes in relation to the combined offences of shop-breaking/theft common (18.8%), burglary/stealing from dwelling/housebreaking (15.6%) followed by the offence of theft (12.5%) and unlawful wounding (9.4%). The customary court pattern was more consistent with the general pattern. Assault common (25.4%) attracted strokes more than any other offence, followed by assault occasioning bodily harm (17.3%) and theft common 13%.

Figure 13: Strokes



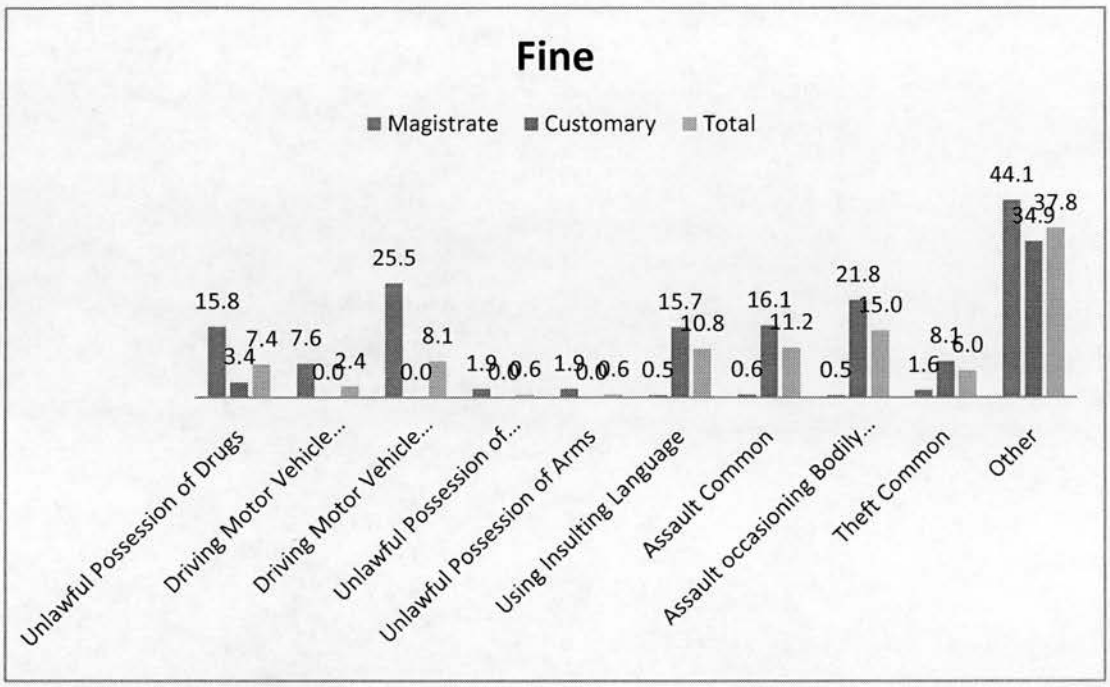
Source: census survey data

Fine

Generally assault occasioning bodily harm (15%) was the offence most likely to lead to a fine, followed by assault common (11.2%), use of insulting language (10.8%) and driving motor vehicle whilst under the influence of liquor or drugs (8.1%).

Figure 14 below presents statistics on the comparative use of the fine. From the statistics it is apparent that, compared to customary courts, magistrate courts rarely levied fines as punishment. Magistrate courts levied fines for mostly for driving motor vehicle whilst under the influence of liquor or drugs (25.5%) unlawful possession of drugs 15.8% and driving a vehicle without licence (7.6%). In the customary courts fines were awarded for assault occasioning bodily harm (21.8%) assault common (16.1%) and using insulting language (15.7%).

Figure 14: Fine

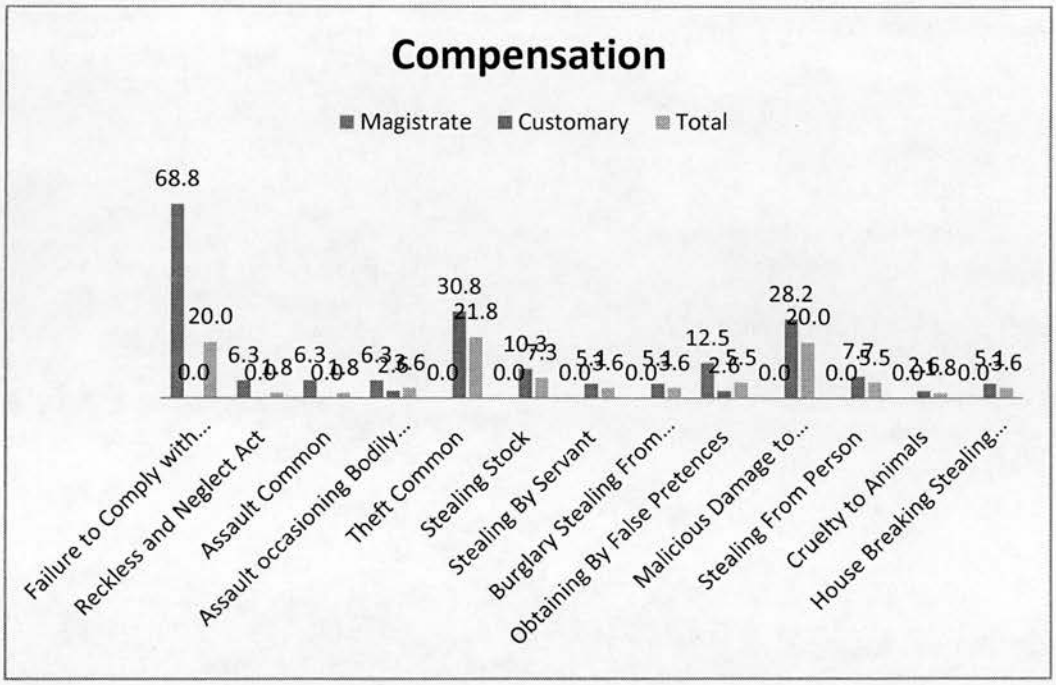


Source: General survey data

Compensation

According to Figure 15, in aggregate terms compensation was used by the two types of courts mostly in cases involving theft (21.8%), failure to comply with a maintenance order (20%) and malicious damage to property (20%). In the magistrate courts it was used most heavily in maintenance cases (68.8%) which were in any case about failure to pay maintenance and in cases involving obtaining by false pretences (12.5%) but was otherwise not much used to punish ordinary offences. Customary courts awarded compensation mostly for theft common (30.8%), malicious damage to property (28.2%), stealing stock (10.3%) and a few other offences.

Figure 15: Compensation

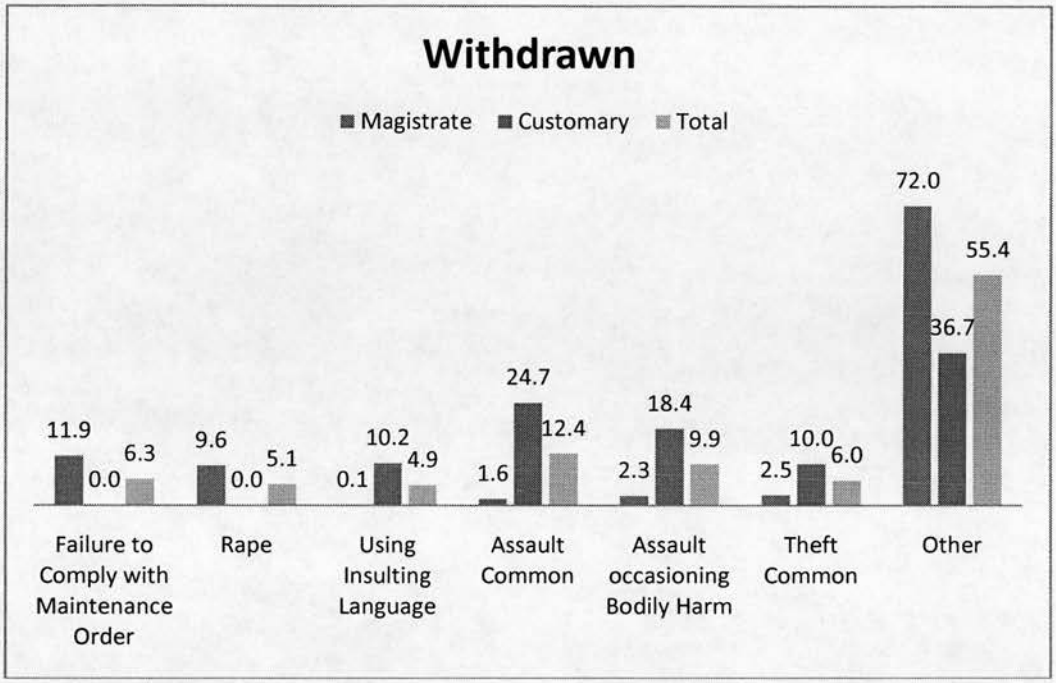


Source: General survey data

Withdrawals

The use of withdrawals was spread thinly across a range of offences. Nevertheless they were most common in relation to assaults (12.4%), assaults occasioning bodily harm (9.9%) and failure to comply with maintenance orders. In magistrate courts withdrawals occurred mostly in maintenance cases (11.9%) and rape cases (9.6%). In comparison in the customary courts withdrawals occurred for the most part in relation to assault common (24.7%), assault occasioning bodily harm cases (18.4%), use of insulting language 10.2% and theft common (10%).

Figure 16: Withdrawn

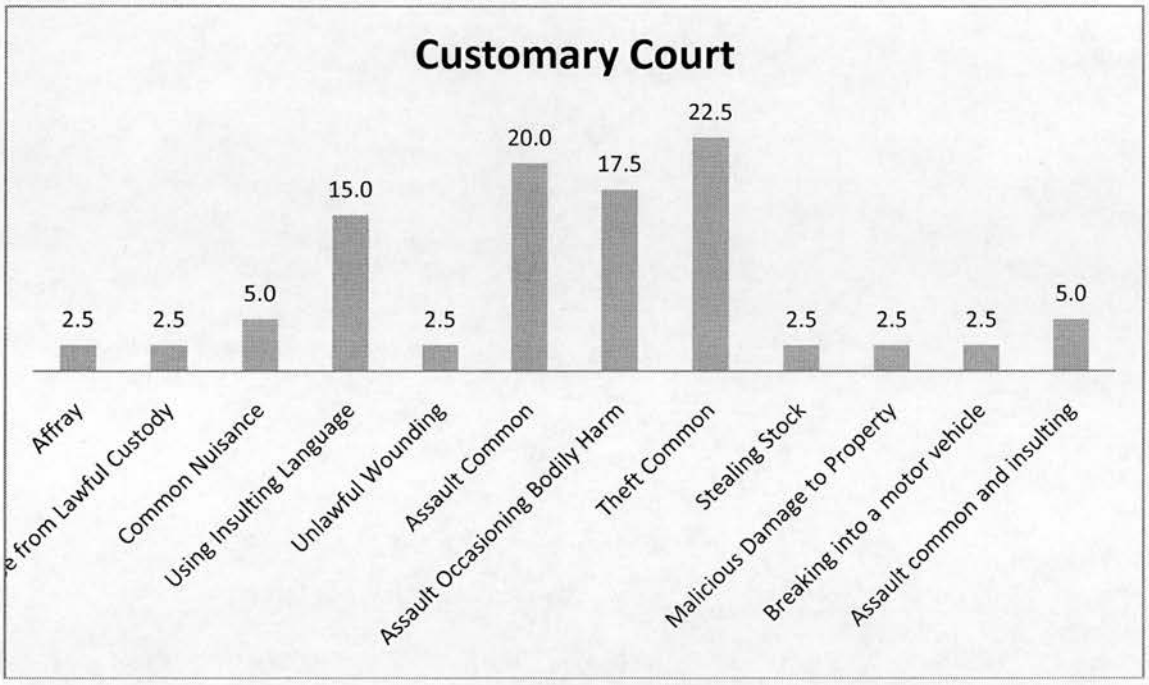


Source: census survey data

Community Service

Community service was not a widely used disposal (40 cases only) and it appeared only in the registers of customary courts but not in those of magistrate courts (see Figure 17 below). Community service was usually not imposed by the trial court itself but by review bodies usually as a substitute for imprisonment.

Figure 17: Percentage distribution of punishment (Community service) by offence and type of court



Source: General survey data

Cautions

The caution was one of the least utilized of all disposals. As Table 11 below shows it was used in only 25 instances over the period covered by the survey. It was most heavily used in maintenance cases (24%). Customary courts hardly used the caution at all as data show that it was employed only once. Magistrate did not use it with any great frequency in relation to ordinary offences but rather, perhaps unsurprisingly, used it most often in cases involving failure to comply with a maintenance order.

Table 11: Percentage distribution of punishment (Caution) by offence and type of court

	Court type					
	Magistrate		Customary		Total	
Offence	**Number**	**Percent**	**Number**	**Percent**	**Number**	**Percent**
FCWMO	6	25.0	0	0.0	6	24.0
DFBWII	1	4.2	0	0.0	1	4.0
GFITPEPS	1	4.2	0	0.0	1	4.0
UPFA	2	8.3	0	0.0	2	8.0
DMVWL	1	4.2	0	0.0	1	4.0
FOVS	0	0.0	1	100.0	1	4.0
UPGT	1	4.2	0	0.0	1	4.0
ECL	1	4.2	0	0.0	1	4.0
AOBH	1	4.2	0	0.0	1	4.0
KAWIS	1	4.2	0	0.0	1	4.0
Unlawful use of motor vehicle	1	4.2	0	0.0	1	4.0
Robbery	1	4.2	0	0.0	1	4.0
False declaration of passport	1	4.2	0	0.0	1	4.0
Undefined offence	3	12.5	0	0.0	3	12.0
Missing	1	4.2	0	0.0	1	4.0
OCBFP &theft common	1	4.2	0	0.0	1	4.0
House breaking stealing from dwelling	1	4.2	0	0.0	1	4.0
Total	24	100.0	1	100.0	25	100.0

Source: General survey data

FCWMO: Failing to Comply With Maintenance Order; DFBWII: Departing from Botswana Without Informing Immigration; GFITPEPS: Giving False Information To Person Employed in Public Service; UPFA: Unlawful Possession of Fire Arm; DMVWL: Driving Motor Vehicle Without License; FOVS: Failure to Obey Valid Summons; UPGT :Unlawful Possession of Govt Trophy; ECL :Escape from Lawful Custody; AOBH: Assault Occasioning Bodily Harm; KAWIS: Killing Animal With Intent to Steal ;OCBFP: Obtaining Credit By False Pretences.

Reconciliation

Table 12 shows that reconciliation was also not that widely used as a disposal. It was the disposal of choice in 103 cases altogether, 55 of which were tried in magistrate courts, and the rest in customary courts. Overall it was used mostly by both types of courts in cases involving assault-related offences namely assaults occasioning bodily harm(19.4%) and assault common(14.6%).The next most frequent use was in relation to maintenance cases(13.6%). However, though it must be said that there were differences in the level of seriousness of cases involved if we compare the two types of courts. In magistrate courts the assaults tended to be fairly serious (assault occasioning bodily harm) compared to those in relation to which it was deployed in the customary courts(assault common). Another notable difference was that as far as magistrate courts were concerned, one group of cases most likely to be resolved in this way were cases concerning failure to comply with a maintenance order. Thus in comparative terms, customary courts were more likely overall to resolve ordinary criminal cases through reconciliation than magistrate courts.

Table 12: Reconciliation

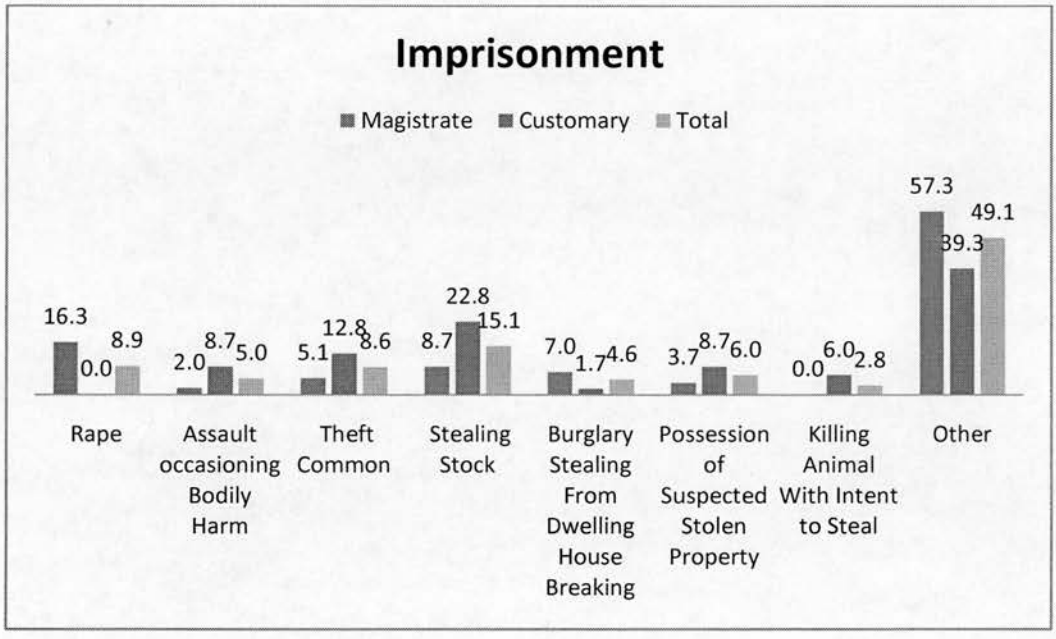
	Magistrate		Customary		Total	
Type of Offence	**N**	**%**	**N**	**%**	**N**	**%**
Motor Vehicle Theft	2	3.6	0	0.0	2	1.9
Failure to Comply with Maintenance Order	14	25.5	0	0.0	14	13.6
Affray	0	0.0	2	4.2	2	1.9
Breach of Peace	0	0.0	1	2.1	1	1.0
Escape from Lawful Custody	0	0.0	1	2.1	1	1.0
Rape	1	1.8	0	0.0	1	1.0
Common Nuisance	0	0.0	3	6.3	3	2.9
Using Insulting Language	0	0.0	12	25.0	12	11.7
Threat to kill	2	3.6	0	0.0	2	1.9
Grievous Bodily Harm	2	3.6	0	0.0	2	1.9
Unlawful Wounding	3	5.5	2	4.2	5	4.9
Assault Common	2	3.6	13	27.1	15	14.6
Assault occasioning Bodily Harm	16	29.1	4	8.3	20	19.4
Theft Common	1	1.8	2	4.2	3	2.9
Stealing Stock	1	1.8	2	4.2	3	2.9
Stealing By Servant	2	3.6	0	0.0	2	1.9
Unlawful Use of Motor Vehicle	1	1.8	0	0.0	1	1.0
Criminal Trespass	0	0.0	3	6.3	3	2.9
Obtaining By False Pretences	0	0.0	1	2.1	1	1.0
Arson	2	3.6	0	0.0	2	1.9
Malicious Damage to Property	1	1.8	1	2.1	2	1.9
Forgery Unlawful Possession of Drugs	1	1.8	0	0.0	1	1.0
Assault Occasioning Bodily Harm and Unlawful Wounding	1	1.8	0	0.0	1	1.0
House Breaking Stealing From Dwelling Theft Common Burglary	1	1.8	1	2.1	2	1.9
Malicious Damage to Property Assault Common	1	1.8	0	0.0	1	1.0
Assault Common Burglary and Theft Common	1	1.8	0	0.0	1	1.0
Total	55	100.0	48	100.0	103	100.0

Source: General survey data

Imprisonment

Figure 18 shows statistics on the use of imprisonment in customary and magistrate courts encompassing all offences during the period 1991-2001. For the latter the leading offence in terms of imprisonment figures was rape (16.3%) followed by stock theft (8.7%) burglary-related offences (7%) and theft common (5.1%). Corresponding figures for customary courts showed that they sent offenders to prison mainly for stealing stock (22.8%) theft (12.8%) unlawful wounding and possession of suspected stolen property at 8.7% apiece.

Figure 18: Imprisonment



Source: General survey data

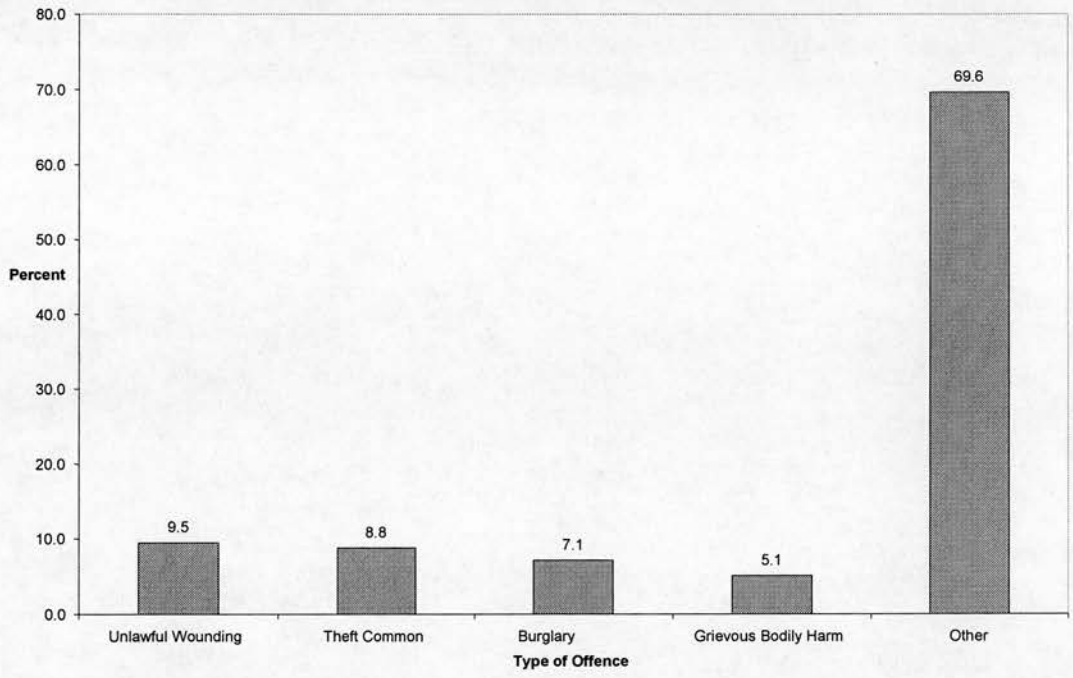
Suspended Prison Term

Unlawful wounding (9.5%), theft common(8.8%), burglary(7.1%) and grievous bodily harm (5.1%) were the offences that attracted the most frequent use of suspended prison sentences in magistrate courts(Figure 19). By comparison in customary courts (Figure 20)offenders received a

suspended prison term mainly for assault common (22.2%) assault occasioning bodily harm (14.1 %) common nuisance (13.3%) use of insulting language (11.5%) and theft common (11.5%) if we consider the top four offences for which the suspended sentence was the punishment of choice.

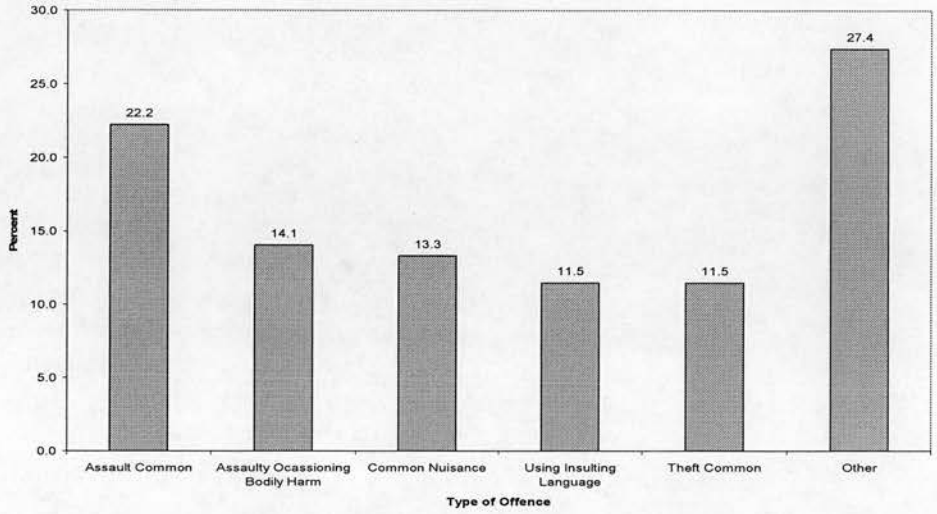
Magistrate

Figure 19: Suspended Sentences –magistrate courts



Customary

Figure 20: Suspended sentences –customary courts



5.4.7 Patterns, Interpretation and Analysis

5.4.8 General Outcomes: H2

There were a number of significant differences between the courts concerning disposals, sentencing patterns and the overall use of penalties. The most common disposals as far as the magistrate courts were concerned were withdrawal, acquittals, imprisonment and suspended prison terms in that order. In the case of customary court the order was rather different. The fine was by far the most common disposal in the latter followed by strokes but withdrawals were amongst the top four or three disposals when selected offences were considered separately. Other disposals were not used nearly as frequently as those enumerated above. There was a large gap between the courts regarding the proportion of cases that were acquitted or withdrawn. For instance in magistrate courts acquittals for property offences and offences against the person stood at 16.0 % and 12.5 % respectively. By contrast, acquittal figures for these same categories of offences in the customary courts were as low as 4.0 % and 3.4 % respectively. There were

also major differences in the type of punishments that magistrates deployed in respect of the selected offence groups. If we consider punishment as a separate category (from non-punishments such as withdrawals, acquittals and other disposals) a similarly interesting picture emerges. Imprisonment and suspended prison term were the punishments that were most likely to be imposed by magistrate courts for the two broad offence categories mentioned. Customary courts by contrast tended to impose fines, strokes and terms in prison in that order for the same general offences.

5.4.9 Disposals/Outcomes and Selected Triable-Either-Way Offence Group

Apart from the two very broad offence categories of property offences and offence against the person, outcomes were broken down and analysed further according to five common triable-either-way offences. Tables 10-19 summarise the outcomes for these offence groups. An analysis of data from those tables reveals some interesting patterns in the outcome/disposals patterns of magistrate and customary courts. Withdrawals were the most common disposal overall for the selected offence groups. It featured among the top three most common disposals for customary courts in respect of burglary and related offences.

The fine dominated customary courts disposals across all offence groups. Strokes and withdrawals were also amongst the top three disposals for customary courts. The pattern of disposals in magistrate courts was different from that of customary courts both in terms of the most common disposals and regarding the type of disposals that tended to predominate in relation to selected offence groups. Not only did withdrawal feature amongst the top four most common disposal across all offence categories but overall it was one of the top two disposals for OAPs and ORPs (see Table 5). The other two most important disposals as far as magistrate courts were concerned were acquittals and imprisonment. It is evident from the

foregoing that overall non-sanctions were the pre-eminent disposals in magistrate courts.

As we have observed above there were differences in acquittal/conviction rates of the two types of courts. This is consistent with what literature led us to expect (Baillie 1969; Kirby 1985; Boko 2000). It was expected that the conviction rates of customary courts would generally be higher than those of magistrate courts reflecting differences in attitudes, procedures and values of the courts as well as training of presiding officers (Republic of Botswana 1971(a); Kirby 1985; Boko 2000; WLSA 1999). It has been suggested that perhaps customary courts are all too anxious to convict offenders (see particularly Republic of Botswana 1971(a)) This may be compounded by lack of training which may well mean customary courts judges have greater propensity to accept prosecution's story than magistrates who are trained lawyers (Kirby 1985; Boko 2000).

Patterns suggesting large differences in acquittal levels of customary and magistrate courts would appear to be consistent with generally held views about differences in the underlying value systems and standard of justice in the customary and the general system (Kirby 1985; Boko 2000). There is a commonly held belief amongst writers and observers that principles governing trial procedures in customary courts especially in those areas of procedure that fall outside the Customary (Procedure) Rules, are different from those that apply in magistrate courts(Kirby 1985; Nsereko 1998;Boko 2000;Tshosa 2001). Procedures that apply in magistrate courts are more elaborate. Traditionalists believe accused persons regularly escape conviction on technical grounds. On the other hand some believe convictions are relatively easy to secure in the customary courts (Kirby 1985; Boko 2000). A view has grown in the general courts that the approach of customary courts to procedure is fundamentally different from that of general courts so much so that the High Court held in *Merapelo* v *The* State (1985 BLR

2150) that when hearing an appeal from customary courts it was advisable for magistrate courts to treat the matter as a re-hearing and not to rely on the findings of those courts owing to difference in rules of evidence and procedure and differences in record keeping standards. However if a customary court fails to follow Customary Court (Procedure) Rules a conviction may be set aside if the matter reaches the High Court.

Compared to customary courts, disposals in magistrate courts were dominated by withdrawals and acquittals both of which are non-punishment disposals. Deep philosophical differences and divergent notions of justice could well be the explanation as some have suggested. Some differences which may not be immediately obvious but could possibly explain divergences in outcomes revolve around the issue of liability. As noted earlier, case processing results relating to other stages of the trial process do help us not only to build a more holistic picture about the two legal systems but also to find out how patterns suggested by literature actually manifest. It would appear that acquittals and withdrawals provide some of the most striking differences between the two systems as far as general outcomes were concerned.

5.4.10 Sentencing Outcomes: Triable Either-Way Offences: H2A

This study is concerned with the impact of the variations of discretion as to combinations of punishment on sentencing outcomes of customary and magistrate courts. In that context, it was critical as part of the general background to questions asked under H3 – H4 which go towards providing specific answers to the primary hypothesis to consider sentencing patterns of customary and magistrate courts in relation to triable-either-way offences, generally. While recognizing that the sentence in each instance depends on the facts of each case, overall patterns

peculiar to either type of court would suggest differences in approach to punishing particular offences or offences generally.

5.4.11 Patterns, Interpretation and Analysis

We find that there were major differences in the type of punishments that customary and magistrates' courts deployed in respect of the selected offence groups. Imprisonment and suspended prison term were the punishments that were most likely to be imposed by magistrate courts for the Property Offences and Offences Against the Person. Customary courts by contrast tended to impose fines, strokes and imprisonment in that order for the same general offences. Customary courts were more likely than magistrate courts to employ a combination of punishments for the same offences. Fines and thrashings have remained, whether used alone or in combination with other punishments, the dominant forms of punishment in the customary courts for these type of offences since the colonial times (Tagart 1931; Schapera1938; Leslie 1969).

5.4.12 Offence Group Specific Sentencing Patterns

Assaults - related Offences

The most common disposal for assault-related offences in magistrate courts was withdrawal. Although there is no direct evidence to support this it is possible that high withdrawal rates occur because a significant proportion of assaults involve friends, acquaintances or neighbours of the victim who may be inclined to withdraw the case especially if the offender shows remorse or asks for forgiveness. Another factor likely to lead to withdrawal of cases was if the parties involved knew each other. Figures for customary courts show higher withdrawal rates for assault-related offences than for other offence groups.

However, compared to customary courts, for magistrate courts withdrawals were by far the most common disposal and by a very wide margin. The differences between the two types of courts may be attributable to differences in procedures of the two courts as available evidence from court registers suggested that a proportion of assault-related cases registered for trial in magistrate courts were withdrawn for lack of evidence but no similar instances were recorded for customary courts. This must, however, be treated with caution because of differences and inconsistencies in recording of reasons for withdrawal. While in many cases reasons for, and the party instigating withdrawals were mentioned, that was not necessarily the case all the time.

Theft-related

For this offence group the most common disposals were imprisonment withdrawals and the fine. However, disaggregated figures show divergences in the patterns of the courts in relation to the elements under discussion in this section. The disposals in magistrate courts were dominated by non-sanctions while in the customary courts sanctions dominated disposals. There were basically two major sanctions of any importance that magistrate courts imposed for theft-related offence groups, namely imprisonment to full term and suspended prison term. However, as disposals, they ranked third and fourth respectively after withdrawals and acquittals. In the customary courts the leading disposals were fine, imprisonment and strokes. There were also clearly some differences in the way the two courts employed multiple punishments. The majority of multiple punishment combinations used by the customary courts to punish theft-related offences were not used by magistrate courts at all. There were also instances where some punishment combinations found in the magistrate courts were absent from customary courts.

Malicious Damage to Property

Withdrawals were the most common disposal in magistrate courts in respect of burglary-related offences. This should not be surprising as most of those who are able to compensate owners of property they had damaged would have been keen to avoid a criminal conviction. Of those sentenced to imprisonment half received suspended sentence, while the other half were expected to serve their terms in prison. The pattern represents a departure from patterns observed in relation to other offences. It may be that the damage involved in such cases was generally fairly serious therefore seen as deserving of more punishment. Perhaps the element of malice is what conditioned and shaped the response of the courts in such cases. Taken as a whole, punishments imposed by magistrates for MDP offences were at the serious end of the scale and somewhat different to the softer approaches they seemed to take in relation to other offences.

In the customary courts the most common disposal for MDP cases was the fine. As with other groups of offences customary courts used a wide range of punishment combinations. On the whole the most common element in most of the punishments imposed by the customary courts was the fine/ compensation combination emphasizing the importance of restoration. The other common multiple punishment combination imposed by customary courts was strokes and compensation. The emphasis in the two types of punishments would seem to be restoration of the property of the complaint. The multiple punishments seemed to be calculated to punish the offender and to replace or restore property to its owner. Customary courts would be inclined to see malicious damage to property as a form of low social disorder, something they would be anxious to stamp out, hence the use of corporal punishment, the cure generally prescribed for such offences. On the other hand the predominance of the fine may be also be caused by the involvement of females in this crime. As whipping of females and males

over the age of 40 years is not allowed, the fine is one of the options available to the courts. The third most common disposal was withdrawals. The level of withdrawals was high by customary courts standards. This may be as a result of the parties' involved wanting to settle the matter out of court.

In contrast punishments by magistrate courts paid little or no attention at all to the restorative aspects. This may have as much to do with the attitude of the general courts as with the procedures which encourages civil action to obtain compensation. Customary courts have the advantage that they can impose fine and compensation at the same time. In the case of magistrate courts the procedures to be followed for award of compensation require that a formal application must be made in order for compensation to take place (Section 316 of the Criminal Procedure and Evidence Act).

Customary courts were more likely to order compensation than were magistrate courts. Even though on its own, compensation was not used very much, the frequency with which it was used in combination with other punishments by customary courts suggests that they are perhaps more anxious to satisfy the victim in property offences than magistrate courts.

Burglary and Related Offences

The most likely disposals for burglary-related offences on the whole were withdrawals, suspended prison terms and imprisonment in that order. The probability that anyone who was convicted of burglary would suffer a punishment in which prison featured in one form or another was therefore fairly high. Taken together disposals in which full imprisonment played a role, were overall the dominant disposals, and exceeded even withdrawals. If we ignore withdrawals for the time being, the other punishment apart from imprisonment that a person convicted of a burglary-related offence would be more likely to receive would include strokes.

The common disposal in magistrate courts in respect of this group of offences was withdrawal. The next highest disposal was suspended prison term. However, there was a break with the patterns seen in respect of other offences in that the acquittal rates were very low. This would seem to confirm the view that evidence in burglary cases is clear and charges are more robust than in other offence categories. Magistrates were more likely to have a court case withdrawn than customary courts where the most likely disposals to punishments were suspended prison term, strokes together with imprisonment or just imprisonment on its own, in that order.

Nuisance-Related Offences

In respect of this offence category, customary courts imposed all conceivable types of punishment ranging from the mildest to the most severe courts. They also deployed a wide range of multiple punishments in respect of this particular offence group even though such cases did not constitute a large cluster.

In sharp contrast in magistrate courts the majority of nuisance cases were acquitted or withdrawn. Magistrate courts did not register any multiple punishments at all for this offence group. Use of combination punishments not only set customary courts apart from magistrate courts, but it also underscores the relative severity of punishment meted out by the former for these offences. This is probably indicative of the overall philosophy and orientation of the two types of courts.

A number of factors may explain the differences. Figures show that customary courts tried almost fifty times as many nuisance-related offences as magistrate courts. Nuisance-related offences together with minor assaults formed the bulk of cases tried before customary courts, and therefore the core of their business in criminal matters. Channelling of different offences to one or the other court of the two types of courts and the pre-occupation

of customary courts with social disorder offences may explain differences in both the distribution and punishment of nuisance-related offences. Whereas magistrate courts might regard nuisance-related offences as minor and therefore generally peripheral to their business, customary courts clearly take a different view. Weak evidence and high level of acquittals in magistrate courts are probably some of the factors that encourage the police to take this type of cases to customary courts instead of the former. It is also possible that more of this type of cases may be being reported to the customary courts particularly because most nuisance cases tend to involve neighbours and relatives. Interestingly nuisance-related cases attracted an unusually large number of requests for transfers if one recalls that the average number of transfers per year was no more than half a dozen. Compared to other offence types/groups it resulted in relatively high number of sentences being modified upon review presumably because they were considered too harsh.

5.4.13 Overall Utilization of Different Sanctions

Imprisonment

For magistrate courts imprisonment was the dominant form of punishment even though it was not, as we have seen, the dominant disposal. In the case of customary courts: imprisonment was the third most important type of punishment that they were likely to impose for the Property Offences and Offences Against the Person. However, customary courts were more likely to send offenders to prison for Offences Against the Person than they were for the Property Offences.

A magistrate court was twice as likely to sentence an offender to prison as customary courts. However, magistrate courts used imprisonment most frequently to punish the more serious offences. None of the most common minor offences including social disorder offences featured amongst the top

four offences punished in this way by magistrate courts. It is interesting to note that three of the top four offences most likely to be punished in this way were triable-either way offences, some of which, like unlawful wounding for example, would be in the middle to top ranks in their own offence group. These offences were stealing stock, unlawful wounding and the multiple offences of shop breaking and theft. In comparison customary courts used a custodial sentence most frequently for stock theft, theft common, assault occasioning bodily harm and killing animal with intent to steal, in that order. The one feature that the customary courts pattern had in common with that of magistrate courts was that stock theft was amongst the top four offences most likely to be punished by imprisonment in either type of court. The only difference was that for the customary courts it was ranked number one while in magistrate courts it occupied the second position. It is interesting to note that two offences relating to stock were amongst the top four offences that tended to attract the punishment of imprisonment in customary courts. It will be recalled that stock theft is one of two offences for which customary courts have been granted extraordinary jurisdiction, the other being drug-related offences. Theft common, a relatively minor offence, was among the top four offences that tended to be punished by imprisonment in the customary courts whereas it did not feature anywhere near the top for magistrate courts.

Imprisonment is available for all offences including low grade offence as the primary punishment, as a substitute/ alternative or part of multiple punishments. Thus there are no non-imprisonable offences as such. Among offences triable-either-way stock theft and drug related offences attracted the longest sentences. Ordinarily, these offences lie outside the jurisdiction of customary courts their powers being limit them to terms of up to 12 months at most. However, they have been granted extra-ordinary jurisdiction in

respect of these offences both which carry mandatory prison terms of 5 years (60 months) and 10 years (120 months) respectively.

When considering imprisonment we must not forget the large variations in conviction rates of the two types of courts. A number of studies have shown that most of those sent to prison are sent by customary courts(Otlhogile: 1993: 530; Love and Love 1996, 41) yet according to our data magistrate courts are more likely to send offenders to prison than customary courts.

However this may be explained by the fact that on a country-wide basis customary courts handle a far greater volume of criminal cases than the general courts. The reach of the former extends even to small rural settlements. By contrast magistrate courts are the lowest ranked general courts found in peri-urban centres and larger settlements. It must also be remembered that customary courts not only have high conviction rates but are more likely to try minor offences for which they may impose prison terms or suspended prison terms. In terms of the ethos of general courts, they would avoid sending offenders to prison. As we have seen magistrate courts will use other punishments to avoid sending offenders to prison.

Imprisonment is the second most serious and severe form of punishment in Botswana after capital punishment. For the average offender, it is the most intrusive and restrictive of punishment. It is for this reason that it is considered as punishment of last resort in many countries and therefore reserved for the most persistent and/or serious offenders. It is perhaps for this reason that most offenders are anxious to avoid it. During my field work I found that most offenders would specifically ask not to be sent to prison when asked to mitigate. This was also confirmed by the results of the second stage analysis looking at impact of legal and non-legal variables.

The general courts (*State v Sethunya BLR 486*) try where possible, not to send first offenders to prison. Imprisonment was also often used in combination with other punishments such as fines, compensation, strokes. As a secondary form of punishment it serves one of two functions. Firstly, where it was used in combination with fines and compensation it was usually deployed as back up in case the offender defaulted on payment of the sum levied. Second, in other cases it was used mainly as a deterrent to the offender not to engage in the behaviour complained of for the duration of the suspended sentence. A suspended prison term on its own serves the same function.

But as we have seen imprisonment, deployed on its own, remains the dominant punishment in magistrate courts. There are a variety of possible reasons why imprisonment is the dominant punishment in this type of court when compared to customary courts. Firstly, it may be that because the range of punishments available to magistrate courts is limited by the fact that they do not have as much discretion to vary the punishment and punishment combinations as the customary courts. Second, as we have seen, even though magistrate courts deal with similar kinds of offences as customary courts, they tend to be those towards the serious end of the scale thus more likely to attract imprisonment.

While on the one hand customary courts were generally less likely than magistrate courts to sentence offenders to imprisonment, they were on the other hand more likely to do so for less serious offences than the latter. Not only did customary courts try most of the cases involving minor offences like common nuisance and use of insulting language, but they were often prepared to award prison terms for these together with some other punishment(s).

Imprisonment is a relatively new form of punishment to customary court having only been introduced as an option in their menu of punishments as recently as 1934 (Schapera 1938). Perhaps a rough equivalent of imprisonment under customary law would be banishment from the tribal territory. Following the 1934 reforms tribal authorities could only banish a person with the permission of the High Commissioner (Schapera 1938). It would therefore appear that imprisonment has now been accepted as part of the menu of punishment available to customary courts. This is borne out by its relatively extensive usage of imprisonment as a punishment by this type of court. It is perhaps the willingness of customary courts to punish minor offences in this way which has probably led to the perception that customary courts are more prison-minded than magistrate courts (Baillie 1969).

This view has been probably been reinforced by statistics indicating that the majority of prison inmates were sent there by customary courts (Otlhogile: 1993: 530; Love and Love 1996, 41). However, it must not be forgotten that not only are customary courts far numerous than the general courts but they also handle more cases annually than the latter.

Suspended Prison Term

The use of a suspended prison term in magistrate courts shows a somewhat different pattern to the use of full custodial sentences. Of the top four sentences most likely to attract the sentence of imprisonment only unlawful wounding featured amongst the top four most likely to be punished by way of a suspended sentence. Offences for which an offender was most likely to receive a suspended sentence in a magistrate court were theft common, unlawful wounding, burglary and grievous bodily harm. Customary courts were most likely to award a suspended sentence in respect of the following offences assault common, assault occasioning bodily

harm, common nuisance, use of insulting language and theft common. Assault occasioning bodily harm also featured among the top four offences punished in this way by magistrate courts. However, the difference between the use of suspended sentence in the two courts was that very low level offences such as common nuisance and use of insulting language featured amongst the top four offences to be punished in this manner by customary courts.

The types of suspended sentences that customary and magistrate courts imposed varied. Magistrate courts may suspend a sentence wholly or partially. There are two types of suspended sentences that a customary court can impose. It may after convicting the offender postpone the passing of sentence for a period of not more than three years on certain condition(s). If, after expiration of that period the offender has not breached the conditions of recognizance the court may discharge him without imposing any sentence. If the court is minded to impose a different form of suspended sentence it may pass wholly or partially suspended sentences subject to certain conditions for a period of not more than three years. The partially suspended sentence is meant to encourage reform as well as to deter (*Julia Seleka* v *The State* High Court Criminal Appeal No. 85 of 1978 (unreported)). The suspension may thus be made conditional upon the convicted person desisting from or promising not to commit a similar offence during a specified period. It may also be used as a threat to encourage offenders to obey some other order of the court e.g. maintenance orders. It has been used where court thought it might cause unnecessary suffering to send a breadwinner to prison. It is also deployed where the court feels that imprisonment would be too harsh or unwarranted in the circumstances but still feels the offence is serious enough to warrant the threat of imprisonment.

Customary courts tended to use suspended sentences more sparingly than magistrate courts. Reasons for this are not easy to determine but it was suggested in *Tlhokomelo and another* v *State* BLR272 that customary courts had no powers to suspend sentences and that the suspended sentence was not part of the traditional repertoire for dealing with case. Otlhogile (1993) has suggested that such a view is misleading because failure of law to incorporate it in the CCA did not necessarily imply that it was not part of Tswana repertoire. However anthropologists who have written (Roberts, van Niekerk, Kuper, and Schapera) on Tswana law are silent on the subject. Perhaps that in itself is an indication that it was not widely used, in which case current patterns suggesting limited use may well reflect traditional patterns. However, what is not in dispute is that suspended imprisonment was unknown to customary law since imprisonment itself was only introduced to the customary courts in the1930s. However, it is difficult to come to a firm view regarding other forms of suspended sentence.

Strokes /Lashing/corporal punishment

Thrashing ranked second amongst punishments most likely to be meted out by customary courts. Magistrate courts were 22 times less likely than customary courts to order that offenders be punished by thrashing. The magnitude of difference in the levels of use of strokes perhaps illustrates differences in attitudes between the young professionally trained magistracy and the more deeply traditional chiefs. Most magistrate being relatively young and liberal in outlook represent and may well hold views regarding corporal punishment that are at odds with those held by chiefs and other traditionalists. That may explain to a certain extent why they might be less likely to impose a sentence of thrashing.

Across all the years considered social order offences tended to attract corporal punishment more than other categories of offences. These are cases

where thrashing was the only punishment imposed by the court. Social disorder offences as defined here include common nuisance, use of insulting language, assault common and assault occasioning bodily harm. Outside this category the offences that also attracted such punishment in any significant amounts are Theft and Escaping from Lawful Custody.

The next level of high use of strokes involved cases where it was used together with a suspended prison term. The pattern remains the same insofar as cases involving social order offences are the focus punishments involving corporal punishment. Social disorder offences particularly, assault occasioning actual bodily harm was more likely to attract corporal punishment.

Corporal punishment is probably the most controversial punishment in Botswana. To the extent that it involves infliction of physical violence, it offends the sensibilities of a small but vociferous segment of the middle class which has been campaigning incessantly against thrashing (Shumba and Moorad 2000, Tafa 2002).Yet there is an abiding belief in Botswana especially amongst older generations, including tribal authorities that thrashing is a good crime control tool and the best cure for delinquency amongst the youth. Any movement in the direction of removing corporal punishment or restricting the use of corporal punishment always faces fierce opposition particularly when levels of crime appear to be rising. The latest amendment to the law extends the use of thrashing to cover a much wider range of offences than before (Section 17(2) Customary Court (Amendment) Act, 2004).

Under customary law the use of thrashing as punishment cut across offence categories (Schapera 1938). Schapera has observed that under Tswana law and custom thrashing was reserved for all sorts of offences and was the

substitute of first choice where an offender sentenced to a fine was unable to pay. When the Customary Court Act was amended in 1972 to bring punishments in customary courts more in line with those in the Penal Code the use of strokes was restricted in terms of the range of offences that could be punished in that manner (Brewer 1972). However the use of corporal punishment as an instrument of correction, punishment and control especially of the young has been widely recognized as important to traditional communities across the country (Leslie 1969). The wishes of customary courts to bear down low level disorder and youth offending has been facilitated by the willingness of the police to enter into an informal agreement over to the customary courts rather than the magistrate so that they can be dealt with expeditiously as one police officer put it to me in an interview. Two chiefs interviewed for this study regretted the prohibition against use of this form of punishment on girls and restrictions regarding its use on the very young. The popularity of corporal punishment as an instrument for controlling the young is therefore both popular and deeply embedded in the culture of Botswana (Tagart 1931; Schapera 1938; Leslie 1969). For instance one writer has observed that Batswana use strokes as 'pedagogical device, to discipline youngsters' (Bouman 1984) while another noted in the 1960s that the use of strokes on young persons was widely practised not only because alternatives were not good enough 'but also because the rigorous treatment of juveniles has strong cultural support' (Leslie 1969:184).

However, the most recent amendment to the Customary Court Act has turned the clock back somewhat. All ordinary offences triable in customary courts are now potentially punishable with thrashing. Prior to the aforementioned amendment, offences that could be punished with corporal punishment included a number of offences which form much of the staple of customary trials: Assault Occasioning Bodily Harm, Burglary, Stock Theft

and Offences Contrary to the Stock Theft Act (Schedule No under Customary Court (Amendment) Act 1997).

The Fine and Compensation

The fine was the dominant disposal overall, it was the most heavily used in punishment in customary courts particularly in relation to Offences Against the Person. However, even in respect of Property offences it was the third most important disposals after withdrawals and imprisonment. Compared to customary courts, magistrates used the fine rather less.

Not only was the fine used very widely on its own in the customary courts, but it was also commonly used in combination with other punishments. Some of the combinations in which it was deployed together with another punishment were found only in customary courts. Whereas in magistrate courts for assault-related offences it was imposed together with a full or suspended prison term while in customary courts it went together with other combinations for the same offences. Thus, in customary courts it served an important function as one of the punishments that could be combined with others to come up an array of possible punishments available to customary courts.

The predominance of the fine as the punishment of choice in customary courts means that it has overtaken restitution/compensation because during the colonial period it was ranked second to the latter (see Schapera 1938). However, both these patterns differ from that observed by Bouman (1984:148) at Mahalapye, which suggested predominance of penal sanctions and a complete reversal of patterns found by Schapera and others after him. Why it has supplanted restitution as the punishment of choice in the customary courts is not easy to explain but expansion of the cash economy and changes in the law regarding when they may be imposed may explain its wide appeal.

A number of factors may account for the fine being more popular or more frequently utilized there than in the magistrate courts. Firstly, unlike magistrate courts which must adhere to the punishments specified under the offence-creating sections of the Penal Code or the general section on punishments customary courts may punish any offence with a fine. Secondly, the predominance of offences in this study such as assaults and related offences which under the traditional Tswana system tended to attract fines was bound to tell. Thirdly a fine is perhaps a natural choice for customary courts where it would have been used interchangeably with some other punishment such as thrashing. Fines and strokes were the most common punishments meted out by the courts (Schapera1938: 48). Fines and most compensation took the form of livestock. But Schapera (1938) observes that money fines were beginning to appear. Fines were made to the court. However, where the court deemed it appropriate to do so, it ordered restitution and compensation.

Under customary law if an offender could not pay a fine, corporal punishment was imposed instead but then all offenders, including women, were liable to be punished by whipping though such punishment was rarely visited upon the very old and the very young (Schapera 1938:49). Presently the law prohibits thrashing of all women or any males over the age of 40 and that means the fine remains the only option available to the sentencing judge in respect of these groups if it appears that a community sentence or a prison term (suspended or otherwise) would not be the appropriate punishment to impose. It is easy to see customary courts resorting to fines because of the relationship that has always existed between fines and strokes/thrashing.

Much the same offences that attracted corporal punishment also attracted fines. These were mainly social order offences particularly assault occasioning bodily harm and assault common. Outside the social disorder

category the offence that tends to attract fines is failure to obey valid summons. Unlawful possession of dagga attracted some of the highest fines. As the reader will have noticed, chiefs have been given greater sentencing powers in respect of drugs and drug-related offence. Together with stock-related offences drug and drug-related offences are regarded as the most serious offences that customary courts are allowed to handle. This factor alone most probably accounts for the high fines for these offences.

Reconciliation

Reconciliation was one of the less common disposals. It was the disposal of choice in 103 cases altogether, 55 of which were tried in magistrate courts and the rest in customary courts. It was mostly deployed in cases involving assault-related offences. However, it must be said that there were differences in the level of seriousness of cases involved if we compare the two types of courts. Assaults coming before magistrate courts tended to be fairly serious compared to those tried in the customary courts. Another notable difference was that as far as magistrate courts were concerned one group of cases most likely to be resolved in this way were cases concerning failure to comply with a maintenance order. Thus in comparative terms, customary courts were more likely overall to resolve ordinary criminal cases through reconciliation than magistrate courts.

Differences in procedures governing the trial process in customary and magistrate courts may be critical in determining the extent to which the two types of courts may be prepared to reconcile defendants with complainants. Section 321 of the Criminal Procedure and Evidence Act allows magistrate courts to promote reconciliation, in certain types of cases, provided the prosecutor consents. However they are restricted in doing so to "proceedings for assaults or any other offence of a personal and private nature not aggravated in degree" (S.321 CP&E). Once the parties have settled the matter through compensation, or upon some other terms

endorsed by the court, the case could then be withdrawn. The accused is given a caution and is for practical purposes treated as acquitted (see *State* v *Tawengwa* 1981 BLR 264). There is no corresponding rule governing reconciliation in the customary courts. However under the traditional set up assaults and other minor wrongs were regarded more or less as civil wrongs and therefore amenable to the kind of settlement proposed under S.321 of Criminal Procedure and Evidence Act. Furthermore, under customary law cases that did not involve injury to the parties concerned were generally dealt with by way of informal proceedings (Schapera 1984: 258). Since in terms of the distribution of offences by volume in this study, customary courts tended to try more assaults and other minor offences, it should not be surprising that more cases in these courts were settled in that way than in magistrate courts.

However, raw figures do not reflect the true extent of efforts invested by customary courts in reconciliation outside of those recorded as have been resolving in that way in the court register. The outcomes of these processes may or may not be reflected on the court records depending at what stage they occur. Mediation/negotiation sometimes occurs before the trial or even before the charge is laid. Obviously where complainant decides not to lay any charge the dispute is likely to go unrecorded. If the charge is recorded and the case proceeds to conviction stage any efforts to intervene will not show on the register or report of the proceedings. It is only when the withdrawal occurs during the proceedings that it will be recorded and even then, reasons for withdrawal may not be stated or consistently stated as being the result of intervention by the court or a result of negotiation between the disputing parties of their own accord. Reconciliation may occur after the case has been concluded. This will not be reflected in the record of the case. This qualification aside, it does seem that a decline in negotiation,

mediation and reconciliation was always going to happen given the dynamic introduced by the common law offence framework.

Even though the role of the family in criminal matters is much reduced compared to the post de-escalation of significance and reconciliation of the disputing parties is evident in customary court records. There were many instances where a case would be withdrawn because the dispute 'was sent back to the family/parents/elders'. Sometimes it is expressed in English 'sent home for reconciliation'. The expressions are *'kgang e buseditswe kwa lwapeng'* (the matter has been sent back home/family) and *'kgang e buseditswe kwa batsading'* (the matter has been sent back to parents/family/elders). One should not be misled by the expression the matter has been sent back to the parents into assuming that the parties involved were necessarily young persons or minor. So the parties involved are usually adults with legal capacity (that is not to say that cases involving young people or minors will not be sent home). In the *Ramatsei* v. *State* Mochudi Customary CRB No. 150/2001 the prosecutor asked the court to allow him to withdraw the case "the complainant says he is no longer interested in pursuing the matter through the courts because (they) have agreed that the matter will be settled before the parents at home, and in this regard I would ask the complaint to tell this court his feelings regarding the withdrawal of the case".

5.4.14 Findings

Finding 5B1: There were large differences between the courts regarding general outcome/disposals patterns, sentencing patterns and the overall use of penalties as postulated under hypotheses H2 and H2A.

Finding 5B2: Patterns in magistrate courts showed predominance of non-punishment disposals such as withdrawals and acquittals while in the customary courts punishment-related disposals were dominant.

5.4.15 Conclusion

There were a number of striking differences between the courts concerning disposals, sentencing patterns and the overall use of penalties. However, there were also similarities in the general patterns of the courts regarding both the most common non-punishment disposal and the most common penalties. Overall patterns show that the divergences in disposals and sentencing patterns of the two types of court were more telling than the similarities. Hypothesis 2 (H2) and hypothesis 2A (H2A) were therefore, confirmed.

SECTION C

5.5 Introduction

In this section I present results on the comparative use of multiple punishments and non-multiple or single punishments by customary and magistrate courts generally, and in relation to selected offences. Regarding selected offences, I focus on the frequency of use, the number and combinations of punishments deployed against these offences.

5.5.1 Hypothesis H3-H4:

Directional hypothesis 3 and (H3 and H4) were intended to address the central question around the primary hypothesis by seeking to answer a number of related sub-questions namely (a) what kind of multiple punishments did customary and magistrate courts award? The aim was to find out whether or to what extent multiple punishments awarded by the courts varied as postulated (b) and if they did, whether there was any relationship between differences in kind of punishment the two courts awarded and variations in the discretion as to punishment combinations as postulated in main hypothesis, (c) further, whether customary courts would tend to punish more severely than magistrate courts leading to unjustified disparities, (d) and, whether, if , legal and non-legal factors

were taken into account we would still find that customary courts punished more severely or not.

Hypothesis 3: Customary courts are more likely than magistrate courts to use multiple punishments to punish a single offence.

Hypothesis 3A: Where customary courts use multiple punishments to punish a single offence the punishments are generally likely to differ in severity when weighted and compared with those imposed for the same offence by magistrate courts.

Hypothesis 4: Where the punishment imposed for the same offence is of the same type, the severity of punishment is likely to vary according to type of court regardless of whether or not the offender and offence characteristics are similar.

5.5.2 Presentation of Results

Overall Use of Multiple Punishments: 1991-2001

The table below shows that in general, taking both triable-either-way offences and non-triable-either-way offences as a whole magistrate courts and customary courts were no more or less likely to deploy single or multiple punishments than the other. Single punishments dominated outcomes at 82.3% and 83% respectively for magistrate and customary courts.

Table 13: Distribution of single and multiple punishments by court type: General

	Magistrate		**Customary**	
Type of disposal	**N**	%	**N**	%
Single punishment	2596	82.3	3839	83.0
Multiple punishments	558	17.7	785	17.0
Total	3154	100.0	4624	100.0
Chi-square	0.67	Sig.	0.41	
Type of offence*	N	%	N	%
Single offence	3084	90.3	5194	93.4
Multiple offences	330	9.7	365	6.6
Total	3414	100.0	5559	100.0
Chi-square	28.45	Sig.	0.000	
*	The Chi-square statistic is significant at the 0.05 level.			

Source: Developed from analysis of census survey data

Use of Multiple Punishments: 1996-2000 Mochudi Supplementary data

Data from the supplementary study conducted at Mochudi offers a different picture from that presented by the general census survey data presented above. The supplementary data offers a slightly different perspective in that it shows the degree of use of multiple punishments as against non-multiple punishments by type of court in relation to specific selected offences. Table 13 shows that in magistrate courts the use of non-multiple punishments was much higher (94%) than the use of non-multiple punishments (6%). The pattern in customary courts was rather different. The multiple punishments exceeded (51% overall) non-multiple punishments slightly (49%). It is also interesting to note that whereas the customary courts deployed up to three punishments together to punish a single offence in 2.7% of cases that came

before them, magistrate courts did not deploy more than two punishments when they did use multiple punishments.

Table 14: Supplementary Survey: Distribution of multiple and non-multiple punishments by court type

		Court Type of court		Total
		Magistrate	**Customary**	
Multipunishment	1	128(94%)	90(49.2%)	218
Non-multiple punishment	2	8(6%)	88(48.1%)	96
	3	0(0%)	5(2.7%)	5
Total		136(100%)	183(100%)	319

Source: Supplementary Survey Data Analysis

5.5.3 Measuring Severity of Multiple Punishments

Measuring severity

In order to facilitate measurement of severity punishments were given weightings according to the rankings assigned. Different types of punishments were each given a score value which represents its severity relative to other punishments. The values ranged from 1-5. The higher the score value assigned, the more severe the punishment. Ranking of the punishments was based on a rough sense of the degree of unpleasantness that each type of punishments induces (von Hirsch 1990; 1992).

Punishments were assigned weights or values as follows:

Caution = 1(score of 1)

Community Service/Probation/Supervision = 2

Fine/compensation=3

Strokes=4

Prison = 5

Limitations

When comparing punishments imposed by the two courts we must remain alive to the possibility that the two may be working to different agendas as already intimated in earlier sections of this chapter. The approach to punishment would therefore be expected to be mediated by courts' specific factors. Culture and lifestyle also come into play (von Hirsch 2004). However this should not in and of itself prevent us from measuring severity from an objective point of view.

Based on literature, courts might be placed along a continuum as follows:

a) Western model
b) Botswana's General Courts possibly a mixture of liberal western model and Tswana model but more inclined towards the western model (mixed)
c) Botswana's Customary Courts more emphatically Tswana (but also mixed)

The western punishment model (with the possible exception of the United States of America) is generally more liberal than other models in that certain that the death penalty has been abolished and minor social disorder offences are not imprisonable(see von Hirsch and Ashworth 2004).

Relating Punishment Severity to Offence Seriousness

According to von Hirsch (2004:185), while opinion surveys involving members of the public suggest that it is possible for ordinary people to reach a consensus regarding the comparative seriousness of offences, it is much more difficult to define clearly from a theoretical point of view what offence gravity means. He argues between the two elements that go to the gravity of the offence, namely culpability of the offender and harmfulness of the conduct, it often easier to determine the former dimension because

substantive law provides some guidance whereas in the case of the latter there is usually no guidance at all.

Having said that, von Hirsch and Jareborg (1991) have developed a general framework for scaling crime based on the impact of different offences on the welfare of the victim ('living standards'). In terms of this model, living standards can be evaluated in terms of three levels: (a) subsistence (b) minimal wellbeing (c) "adequate" well being (von Hirsch 2004: 187). The model is concerned with impairment of the means or capability to achieve a certain quality of life. The majority of what Hirsch terms 'victimizing offences' can be assessed on the basis of the extent to which they affect the following aspects of life : (a) physical integrity (b)material support and amenity (c) freedom from humiliation and (d) privacy (von Hirsch 2004: 187). The model such as it is allows for variation scaling of offences according to culture. But important question arise: What culture? Whose culture? For instance in the case of customary law whose customary law would form the normative basis for the ranking of offences? It has been suggested that there are many versions of customary law including lawyers' customary law, traditionalists' customary law and living law (Molokomme 1995 see also Sanders 1987). Because of the difficulties involved in the formulation of a model from scratch based on the values proposed by von Hirsch and Jareborg (1991), in the present study we relied on differences in the possible maximum prison term and/or other punishments that an offence attracts, to rank the offences. Virtually all offences were imprisonable at the time the study was conducted.

Public opinion has proved to be as much a reliable guide to gauging severity of punishment as it has been in the measurement of offence gravity. Researchers working in the area of offence seriousness generally base their models on the Selling-Wolfing offence severity scale (Myers and Talarico 1987). The Selling-Wolfing offence severity scale is widely used in the United

States of America and is constructed using data on community attitudes towards particular offences. Other approaches to scaling of severity values include self-constructed scales where different values are assigned to different types of punishments on sliding scale based on the researcher's own assessment of such punishments (Shoham 1959, Tiffany et al 1975) or a scale based on post-facto evaluations of judicial performance (McDavid and Stipak 1981/82).

The Selling-Wolfing scale could not be utilized in this study for a number of reasons. First, score values used in that kind of scale may not necessarily translate into the same values in the Botswana context. Second, no data on community judgements about crime severity exists in Botswana that could be used to construct a scale based on the principles underlying the Selling-Wolfing scale, which could in turn , be used to contrive severity scores. Instead we constructed a scale with severity score values for different penalties ranging from one to five. Others have used similar scales though with different value ranges from my own (e.g. Shoham 1959). In terms of the scale used in this study, the different values must be added up to obtain the overall score for multiple punishments (see preceding section). We did not believe that the model based on post facto evaluations of judicial performance would have been suitable because of the cross-system nature of the present research.

Table 15: Multiple Punishments and Severity

ASSAULT – RELATED OFFENCES	
PUNISHMENT COURT	**SCORES**
Customary Court	
Fine & Community Service	5
Fine & Compensation	6
Strokes & Fine	7
Fine, Community Service & Compensation	12
Stroke, Imprisonment & Compensation	12
Magistrate Court	
Suspended prison term & Compensation	8
Suspended prison term & fine	8
Suspended prison term & stroke	9

Source: Extracted from general census data

Table 15 shows that the severity scores for assault-related tried in customary courts ranged between 6 and 12 and those for cases processed in magistrate courts the range was relatively narrow with the lower-end score at 8 and the upper end score of 9. Customary courts also used six different combinations of multiple punishments to punish this group of offences whereas in comparison magistrate courts deployed half the number of combination used by the former.

Table 16:

MALICIOUS DAMAGE TO PROPERTY	
PUNISHMENT COURT	**SCORES**
Customary Court	
Strokes, compensation & suspended prison term	12
Strokes & suspended prison term	9
Imprisonment & compensation	9
Stroke, imprisonment & compensation	13
Fine, compensation & imprisonment	12
Fine & compensation	6
Strokes, fine & compensation	10
Strokes & compensation	7
Magistrate Court	
Compensation & suspended prison term	8
Strokes & imprisonment	10

Source: Extracted from general census data

With respect to malicious damage to property the lowest and highest severity score values for customary courts were 6 and 13 respectively. For magistrate courts the only two multiple punishments recorded and their values were 8 at the lower-end and 10 at the top end. Customary courts used eight different combinations of multiple punishments. In contrast only two punishments were deployed by magistrate courts

Table 17:

THEFT RELATED OFFENCES	
PUNISHMENT	**SCORES**
Customary Court	
Strokes & imprisonment	10
Strokes & fine	7
Strokes, fine & compensation	10
Compensation & imprisonment	9
Strokes &compensation	7
Fine &compensation	6
Fine, compensation & Imprisonment	12
Fine, Community Service & Compensation	8
Stroke, Compensation & Imprisonment	12
Stroke, fine & compensation	10
Imprisonment & Compensation	9
Strokes, Imprisonment & Compensation	13
Fine and Suspended Imprisonment	8
Compensation & Suspended Imprisonment	8
Compensation & Strokes	7
Strokes, Compensation & Suspended term	12
Magistrate Court	
Fine & Suspended Prison Term	8
Compensation & Suspended Prison	8

Source: Extracted from general census data

The score range for theft-related offences in the customary courts was 6 to 13 while the magistrate courts' score was simply 8 in every instance. Combinations of punishments deployed in customary courts were as many

as sixteen while those used by magistrate courts for this offence group were no more than two.

Table 18:

BURGLARY-RELATED OFFENCES	
	SCORES
Customary Court	
Strokes, Compensation,& Suspended Prison term	12
Strokes & Compensation	7
Strokes & Imprisonment	10
Magistrate Court	
Strokes & Imprisonment	10

Source: Extracted from general census data

Burglary-related offence tried in customary courts tended to attract multiple punishments with severity scores ranging from 7-12 and of different combinations. Those cases tried in magistrate courts attracted only one type of combination punishment which registered a score of 10.

Table 19: Multiple punishments

NUISANCE-RELATED OFFENCES	
PUNISHMENT COURT	**SCORES**
Customary Court	
Compensation & Imprisonment	9
Fine & Compensation	6
Fine and Compensation	5
Strokes & fine	7
Strokes & Imprisonment	10
Fine and Imprisonment	9
Imprisonment & Compensation	9
Compensation & Suspended Prison term	8

Source: Extracted from general census data

Only customary courts deployed multiple punishments of any description in relation to nuisance-related offences. The severity scores for this offence category ranged from 5 to 10.

NB: The combinations of punishments represented in table 14 to 18 were exclusive to each court type. The only exception was the strokes and imprisonment combination under burglary. Where the patterns showed that the courts deployed the same type of combinations of punishments as the other for a particular offence group, those combinations were excluded from the tables save for the case of burglary-related offences. Very few combinations were common to both courts.

5.5.4 Effects of Legal and Non-Legal Variables on Sentencing

In this section we take comparison of punishments imposed by magistrate and customary courts to another level. While we have thus far considered how customary and magistrate courts punish similar offences, we have not considered how they punish these where offenders involved had broadly

similar in terms characteristics and background. To do that we need to look at the case factors involved. We need not look at all case factors as the range of these could be potentially enormous. In this study I have restricted these factors to a number of factors I have termed 'legal and non-legal variables' following Martin and Simpson (Martin and Simpson 1997/1998; see also Ashworth 1983).

Defining legal and non-legal variables

One of the central themes and founding assumptions of this study is the idea that cases can be and are classifiable into categories 'similar' or 'different'. It may be asked what criteria has been used to determine the boundaries or parameters of each case or class of cases so as to make it different or similar to the mother group or the opposite group as the case may be. It is important to warn the reader that I have selected the criteria for differentiation on the basis of those elements or variables that are;

(a) Common to all cases e.g. age.
(b) Reasonably discrete and therefore measurable
(c) Known to or believed to be good predictors of sentencing outcomes

The following elements have been identified for the purposes of this study as the criteria for determining and measuring similarities or differences between cases or classes of cases.

(a) Legal variables: this consists of variables that constitute a particular offence category and those elements of non-demographic nature (Martin and Simpson 1997/98,) that must be considered at sentencing stage as a matter of law. The latter category encompasses such elements as prior conviction, mitigating or aggravating factors. The former refers to offence type. Aggravating factors could easily form part of the definition or grading of the offence. Aggravating factors may be considered separately from the offence. This may vary

between jurisdictions (see above). I have adopted and modified a classification system by Martin and Simpson (1997/98). The definition provided above is my own.

(b) Non-legal variables: these include those variables that Ashworth describes as 'demographic features of sentence' (Ashworth: 1983: 47). However, our class of selected variables under this label is less extensive than Ashworth's. In the context of this study the demographic variables considered are; age, employment status and sex. It is strictly speaking unwise to assume a water tight separation between legal and non-legal variables because some of the latter may be included in the factors to be considered at sentencing in terms of the law (i.e. it may be mandatory to take them into account).

The boundaries of legal and non-legal variables are by no means clear in every context and jurisdictions. It is important to remember that in some jurisdiction in the United States of America the courts ignore certain factors.

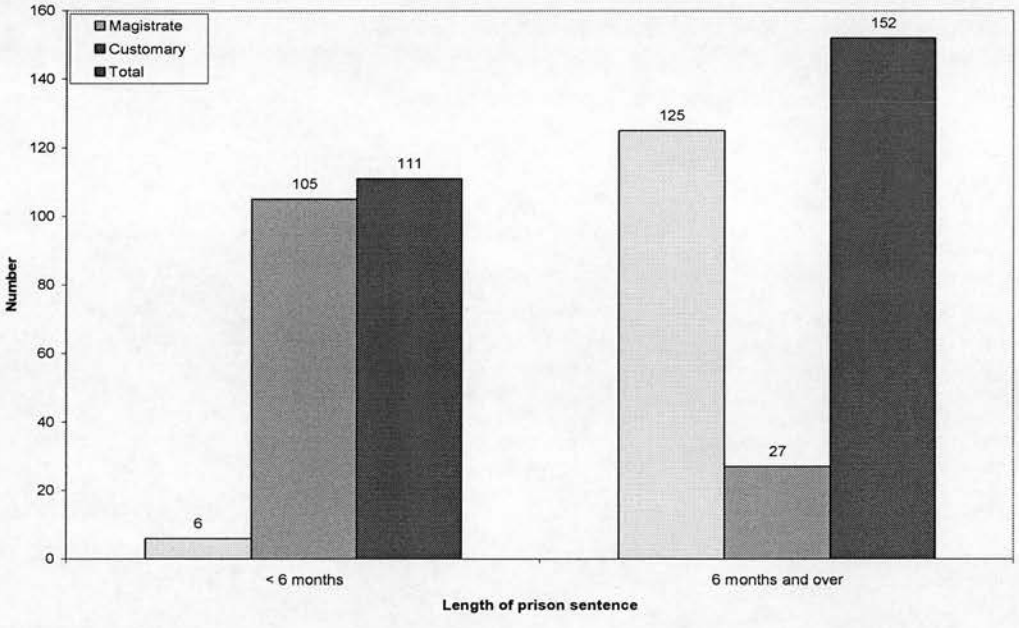
Effects of Legal and Non-legal Variables on Sentencing: Legal variables

Figure 21 and Table 20 summarize and compare the effects of the various statistical variables described in this section as legal and non-legal variables on imprisonment. Using binary logistic regression where our dependent variable is prison term (thus length of imprisonment) and our independent variables are legal variables (such as previous conviction, mitigation, and aggravation and the non-legal variables which include sex of the offender, age, and employment status. The type of court was used as a selection variable and the variable on plea was dropped since it was constant.

However, we established in our preliminary analysis that the number of cases with a prison term of more than six (6) months for the customary courts was very small; whilst for the magistrate courts the number of cases with a prison term of less than six (6) months was not sufficient to make any

meaningful analysis. Since some of the cases were not classified due to either missing values in the independent variables or categorical variables. Therefore, estimation could not be performed due to the fact that there were no cases. Figure 21 below presents a distribution of cases with a prison sentence for us to illustrate the inadequacies in the data set.

Figure 21: Length of prison terms: customary and magistrate courts



Unfortunately, the other data sets did not provide information on the dependent and independent variables of interest (as indicated earlier). I however used this data to ascertain whether type of court had any directional influence on the type of sentencing. A bivariate analysis was undertaken using binary logistic regression on the following sentencing outcomes as dependent variables: imprisonment, strokes and fine. In this regard, the independent variable is the type of court. The results show that the magistrate court is twice as likely as the customary court to impose a prison term and this was significant with a p value <0.001. The data were also analyzed to find out whether the magistrate court is more or likely to

award strokes for a given offence, the results show that the magistrate court is 22 times less likely than a customary court to award strokes. This was significant with a p value <0.001. While on fines, the data shows that the magistrate court is 1.5 less likely to impose fines the customary court. The statistics was significant with a p value < 0.001 (also see Table 20 below).

Table 20: Significance –prison, strokes &Fine

				95.0% C.I.for EXP(B)	
		Sig.	Exp(B)	Lower	Upper
Imprisonment	Magistrate court	0.0000	1.9704	1.6784	2.3133
	Constant	0.0000	0.0600		
Strokes	Magistrate court	0.0000	0.0440	0.0309	0.0628
	Constant	0.0000	0.2179		
Fine	Magistrate	0.0000	0.6728	0.6048	0.7484
	Constant	0.0000	0.3420		

5.5.5 Patterns, Interpretation and Analysis

Hypothesis 3: When the general use of multiple punishments was considered for all offences, the level of use was found to be roughly similar. However, if we consider triable-either way offences from the supplementary study we see that patterns indicate generally higher use of multiple punishments in customary than in magistrate courts. There was universal use of multiple punishments in customary courts even though there were large variations in levels of use according to offence group.

Each of the two types of court generally tended to use multiple punishments combinations peculiar only to itself that is, not used by the other. Only a few combinations were similar. Customary court combinations were quite varied

whereas those of magistrate courts tended to be limited mostly to a suspended prison plus some other punishment. Furthermore while magistrate court combinations rarely exceeded two punishments, those of customary courts often included up to three different punishments. So, customary courts used a wider range of multiple punishments, across all categories of selected triable-either-way offences namely assault-related offences, malicious damage to property, theft-related offences, burglary and related offences and nuisance-related offences than magistrate courts. They also used these punishments more extensively in relation to each specific offence group than the latter. In other words, not only were customary courts more likely to impose multiple punishments for all the named offence groups but they were also likely to do so more often.

Magistrate courts tended to use multiple/combined punishments very sparingly. Conversely magistrate courts relied heavily on deployment of one or other type of penalty on its own to punish single or non-multiple offences in the selected offence categories. The highest level of use of combined or multiple punishments by magistrate courts was registered against burglary and related offences. Magistrate courts did not deploy multiple punishments at all against nuisance-related offences though it must be said that the number of nuisance-related offences tried in these courts were so small as to be insignificant.

There was no offence for which customary courts did not deploy multiple punishments. However the level of use of multiple punishments varied enormously among the selected offences offence groups. The lowest levels of use were recorded for nuisance-related offences and assault-related offences. MDP had the highest level of use multiple of punishments of any offence group.

Hypothesis 3A Customary courts had the highest severity scores for all of the offence groups. The highest score in customary courts for most categories except for nuisance-related offences was 12 or above. In contrast for magistrate courts the highest score was 10, even then for only two out of five offence categories. If we take into account that only effective punishment or punishment that takes effect immediately then we find that the multiple punishment score of magistrate courts is much lower for all offences than is reflected by the severity scores. This is because a suspended prison term unlike all the other punishments is only activated if the offender is convicted of a similar offence within a given period. In the case of common nuisance-related offences magistrate courts did not deploy multiple punishments at all.

Even though there was not a great deal of difference in the mean scores of the two courts for the four offence categories for which the courts imposed multiple punishments, too much significance should not be attached to mean scores because the differences in the number of multiple punishment combinations imposed by customary courts was far numerous than that of those awarded by magistrate courts which numbered two on average. For instance, in the case of theft-related offences the customary courts used a total of sixteen different punishment combinations while magistrate courts deployed only two combination types.

Customary courts recorded the highest punishment scores across all the five of offence categories under discussion. The largest difference between the maximum score values of the two courts in respect of any offence group was 5 points, which was registered in relation to theft-related offences. Assaults and malicious damage to property registered a 3 points difference in score while the smallest difference in scores was 2 points registered in respect of burglary and related offences. Unlike customary courts,

magistrate courts did not deploy multiple punishments in relation to nuisance-related offences. However, the deployment of the severest punishment, imprisonment, together with other punishments means customary courts punish this offence group more severely relative to magistrate courts. But, in terms of mean scores there was not a lot that separated the two courts. The mean scores of customary courts were higher than those of magistrate courts in respect of theft-related offences and malicious damage to property while the situation was reversed in the case of assault-related offences and burglary-related offences. The differences in the mean scores of the courts for the four offence groups where multiple punishments had been awarded ranged between 0.3 and 0 .75. The smallest difference and biggest scores were for assault-related offences and malicious damage to property respectively.

Hypothesis 4: Even though it was originally my intention to measure and compare the effects of legal and non-legal variables on all primary offence types, this was ultimately not possible due to thinness of data on strokes, fines and compensation. This was not altogether surprising given that the distribution of these punishments was highly skewed. In addition, the period covered by supplementary data was rather short: 1996-2000. Looking at the figures we find that magistrates ordered only a limited number of strokes (10) as compared to customary courts which ordered (91) over this period. A similar problem arose in respect of fines and compensation. In respect of the latter magistrate courts imposed a fine in only three cases where customary courts used it in 48 cases. As regards compensation, magistrate courts did not order compensation at all during the period in question but customary courts awarded it in ten cases. This made it difficult to use logistic regression to analyse the differences between the courts in respect of these types of punishments.

5.5.6 Findings

Finding5C1: Customary and magistrate courts tended to deploy multiple punishments' differently in relation to triable either-way offences

Finding5C2: Customary courts had the highest severity scores across all the offences considered.

Finding 5C3: Outcomes of customary courts were less predictable than those of magistrate courts.

5.5.7 Conclusion

The study found that the assumption that customary courts would be more likely than magistrate courts to use multiple punishment to punish a single offence(H3) was only partially true. When all offences tried by the two courts were considered, the propensity to award multiple punishments was about the same. However, when only triable-either way offences were considered, customary courts it was clear that customary courts tended to deploy multiple punishments more frequently than magistrate courts in relation to those offences. When they deployed multiple punishments, customary courts punished more severely than magistrate courts as hypothesized under hypothesis 3A (H3), thus the results confirmed the hypothesis. In regard to hypothesis 4 (H4), it was found that the data was too thin to be used in a meaningful way.

5.6 General Conclusion

This chapter has presented and analysed the results of the census survey, supplementary survey and derivative data in relation to the distribution of offences, common disposals, uses of various punishments, quanta of punishment and severity scores based on use of different combinations of multiple punishments.

CHAPTER SIX

6.0 COURT OBSERVATIONS: DATA PRESENTATION AND ANALYSIS

This Chapter provides a sketch of various dimensions of the trial process in customary and magistrate courts, including factors that are critical in shaping the dynamics of trials in these courts. More specifically it focuses on those dimensions of the trial process which I considered might provide some insight into why there are similarities and differences in outcomes of case(s) coming before customary and magistrate courts. As such, results from the court observations illustrate certain features typical of customary and magistrate courts, though no claim is being made here that the cases observed were representative of cases handled by the two types of courts in any but limited way.

6.1 Rationale for Court Observations

According to Sarantakos (1998: 207), "literally, observation means a method of data collection that employs vision as its main means of data collection." In the present study court observations were intended to provide us with insights into court settings: interaction, rules, rituals, process values and the outcomes of cases. In that regard the court observations were meant to be both exploratory and to enhance the researcher's knowledge and understanding of the workings of the two systems. Secondarily, they were intended to provide yet another perspective on the nature of, and relationship between, court processes and outcomes in order to complement census survey and interview data. Furthermore, court observations provided the researcher with the opportunity to pick up new thematic threads for the interviews, part of the inquiry as well as to fine tune and refocus questions for the interviews.

6.2 The Aims of the Court Observations

The overall objective of the court observations was to provide a snapshot of different dimensions of the trial process and their relationship to case outcomes. This part of the study sought both to describe and compare the trial process in customary and magistrate courts along a number of dimensions, namely organization, processes, and rules. The present study had to straddle these elements. Literature shows that approaches to anyone of these elements on its own are quite diverse (Carlen 1976, Conley and O'Barr 1990, Bogosh 1999). The initial plan to use hypothetical cases and an interaction schedule to capture some aspects of court hearings had to be abandoned because they imposed unnecessary constraints on the ability of the researcher to gather other information about the trial process.

6.3 The Focus of Court Observations

The primary focus of the observation was on the processes leading to and types of resolutions that the courts arrived at in the cases that were studied. I was initially uncertain which dimensions and aspects of these processes to privilege over others. This is what led me to toy around with the interaction schedule in an effort to capture the dynamics of interaction in the different court settings. The idea was later dropped as it proved to be impractical. I therefore went back to studying the rituals of the courts and trying to relate them to the substance and outcomes of cases. In that broad sense this part of the investigation revolved around how presiding officers in customary and magistrate courts conducted criminal cases as well as their general approach to criminal cases of various kinds.

6.4 Data Collection and Data Analysis

The court observation period, combining the pilot and study ran from June 2001 to February 2002.

(a) *Data Collection*

Cases that were observed in magistrate courts were selected based on weekly schedules put out by the court staff. A major problem in the magistrate courts was that schedules were not entirely reliable because of the frequent postponement of cases. To minimize the impact of this problem on progress of the research and to avoid making needless trips to the sites, which were some considerable distance from the main city where I was based, I kept in close contact with court clerks. As a matter of convention customary courts did not release any schedule of cases to be tried in advance as cases were often dealt with on the day they were registered or early the following morning. I therefore decided that the best strategy was to check on a daily basis with court clerks to find out what types of cases would be coming before the court on any given day. But often I had to simply present myself at the court premises and then wait for the appropriate type of case to come along.

Data was collected using manual and electronic means in form of note-taking and audio-tape respectively. I kept a daily diary of court processes and any unusual occurrences in and/or around the court. This information would in turn inform further observations or other dimensions of the research process such as the interviews. The case of *State v Bogatsu and others* is one such example of observational data used in this way. An interactions schedule was developed for use as an observation instrument but was later dropped because it distracted from other activities taking place in the courtroom.

(b) *Data Analysis*

Electronically captured data was first transcribed, and in the case data from customary courts, translated from Tswana to English, and then broken down according to thematic threads. Hand recorded material was also summarized according to themes. The overall purpose of the exercise was to provide a

description and analysis of rules, practices, processes of the two types of courts and their outcomes based on observational data.

6.5 Types of Cases Selected and Rationale for their Selection

Cases for observation were those that fell within the bracket of those triable-either way offences described elsewhere in this thesis as assault and theft-related offences. The main reason for selecting these offence groups was that I considered that unlike other groups of offences they were quite common and encompassed fairly serious to middle ranking offences that were likely to come before both customary and magistrate courts in sufficient numbers to enable reasonable comparisons to be made. However during the actual study we found that delays in the processing of cases in magistrate courts made it difficult to observe enough triable-either-way assault-related offences to make comparisons so I decided to include Grievous Bodily Harm which is not triable in customary courts. Below is a table of observed cases.

6.6 Observed Cases

Table 21:

Case No /Name	Court	Offence	Disposal
Criminal Case (CR)No 123/01 S v Aupa Sekobye	CC	ABH	6 months wholly suspended + 5 strokes
CR No MU 62 R. Bogatsu & 7 others	MAG	ABH	Charge dismissed in terms of S32(1) of the Penal Code
S v Lucky Sekgopi	CC	ABH	8 months imprisonment wholly suspended+ 5 strokes
CRNo120/01 S v Morgan. H Molefe	CC	ABH	Withdrawn by Complainant
CR No 119/01 Abdulraman Sello	CC	ABH	8 months imprisonment wholly suspended +5 strokes
CR No 162/01SvMolefe Parahene	CC	ABH	8months imprisonment , 6months suspended +5 strokes
CR No 65/01 S v Molefe Bajupi Dikutu	CC	AC	8 months imprisonment (reviewed)
S v Gloria Pilane (2001)	MAG	UW	Acquitted

S v Hans Molefe (2001)	MAG	UW	12 months imprisonment wholly suspended
CR No MU 265/2001	MAG	AITGBH	Acquitted
CR MU184/01 S v Thabo Phiri	MAG	GBH	24 months suspened+P200 fine
MU175 /01 State v Onkabetse Kabelo Mogopodi	MAG	AITGBH	Conclusion unknown
CRB 184/01 State v Thabo Phiri	MAG	GBH	24 months imprisonment suspended & P200 fine
State v Moeng Moeng (2001)	CC	UIL	5 strokes
State v Kabo Motshegwe	CC	CN	4 months imprisonment wholly Suspended and 4 strokes
CR Case No 116/01 Beauty Phokedi	CC	ST	12 months suspended. State appealed because sentence wrong in law
State v Modise	CC	CT	Case withdrawn. Elders to settle matter
CR 124/01 State v Ronnie Moremi	CC	HBT	7 months imprisonment wholly suspended (theft)& 5strokes(Housebreaking)
MU217/01StatevLucky Letshwiti and Bajuta Kesenyeditswe	MAG	S	2 years imprisonment 1and half suspended and 5 strokes (Lucky) 1year imprisonment suspended and 5 strokes (Bajuta)

Keys: ABH: Assault Occasioning Bodily Harm; AC: Assault Common; AITGBH: Acts Intended To Cause Grievous Bodily Harm; CC: Customary Court; CN: Common Nuisance; GBH: Grievous Bodily Harm HBT: House Breaking and Theft; MAG: Magistrate S: Stealing; ST: Stock Theft; UW: Unlawful Wounding; UIL: Use of Insulting Language.

6.7 Description of court settings

(a) *Urban & Rural Customary Courts*

Trials in the chiefs' courts at Kanye and Mochudi took place under a *Leobo*, a thatched, gazebo-like structure which has replaced the traditional roofless wooden semi-circular fence-like structure that used to serve the same

purpose in the Kgotla of the past. *Leobo* is a general purpose structure which is essentially designed to provide shade for the head of the Kgotla, senior members of the traditional leadership and important guests. The basic semi-secular seating pattern remains the same for all types of gatherings including court sessions. In terms of this seating arrangement, the Presiding Officer, and Rememberancers (see Schapera1938) who nowadays are simply referred to as members, if they are in attendance, form the outer-boundaries of the semi-circle. Inside the semi-circle the defendant and the complainant would be seated next to each other facing the Presiding Officer and the Members. Sitting directly opposite would be the Court Clerk and the Prosecutor. Behind these two groups would be seated members of the public also in a semi-circular pattern. Any witnesses called would share the bench inside the two semi-circular formations with the defendant and the complainant. At Kanye where there was participation by members, they were free to come and go as they pleased so that in one session as many as seven could show up and in another as few as three might be present. Sometimes there might be none at all as was always the case at Mochudi and Lobatse. The public at all the three customary court sites seemed to be much less enthused by criminal cases compared with civil cases judging by the numbers attending court cases. Generally many more relatives of disputants attended civil cases than did criminal cases. In the case of the latter relatives would sometimes be absent altogether. It was mainly old men in their late fifties and upwards who tended to go to the Kgotla to listen to cases. Women were more likely to attend if there was a civil matter coming before the court.

The set up at the urban customary court in the town of Lobatse could not have been more different from that of customary court at Kanye and Mochudi. The presiding officers' office doubled up as a trial court. According to the organization of the court the presiding officer would sit behind an office-size mahogany table which he shared with the Prosecuting

Officer and the Court Clerk who would sit facing each at opposite ends of the table. The complainant and the defendant shared a bench immediately in front of the table. There would normally be only one bench for members of the public at the back of the room. In any case there was hardly enough room to accommodate more than one bench. A few office chairs would be hauled in from of other offices when more members of the public than usual showed up to listen to a case. More often than not these were friends or relatives of the disputants. There were no remembrancers (members) in this court. Not surprisingly public participation in the proceedings was minimal.

(b) *Magistrate Courts*

The layout of the magistrate court at Lobatse, Kanye and Mochudi was roughly similar in its dimensions as well as in terms of the allocation and use of space among various court officials and the public. The magistrate had her/his own private space which was linked directly to his/her office (chambers). The magistrate would take her/his sit on a chair with a tall-back behind a heavy wooden table on a raised platform at the front of the courtroom. A few paces from her/his table next to the witness box would be the Interpreter. Directly in front of the Magistrate but a good distance away would be a table for Prosecutors and Defence lawyers if there happened to be a defended case among the cases set for trial on the day. To the right or left of the Magistrate but a fair distance away would be the dock for Defendants (there might be a bench next to it to accommodate more accused persons). At Kanye, in between the magistrate about two to three arm lengths away from the dock occasionally would be seated the Court Orderly. The rest of the room behind the Prosecutors would be filled with benches for use by the general public. These benches were often empty to half-full depending on the nature or number of cases being processed on a given day. The audience in these courts was predominantly young to middle-aged.

Looking at the various aspects of the design of magistrate courts, it seemed obvious that they were planned with a purpose in mind, in that, the set up structured interaction and probably also contributed significantly to the atmosphere of formality pervaded in these courts. The height and position of the magistrate meant that s/he commanded the attention of everyone in the courtroom.

6.8 Rules and Patterns of Rule Use and Interpretation

Procedural rules governing the trial process up to and including conviction and sentence in customary and magistrate courts were broadly similar, at least in form and outline. The version in operation in customary courts appeared at first glance to be a simpler and abbreviated version of those in the Criminal Procedure and Evidence Act which governs trials in the general courts. However, it soon became clear during court observations that there were some significant divergences in the application of rules and in the general practice of these types of court.

Amongst the most important of these were that (i) some key areas of procedure in the customary court trial process were regulated by customary law, (ii) rule density and complexity varied by type of court even where the primary rules were similar. These were amongst factors which according to observational data were potentially consequential for conviction/acquittal rates, withdrawals and reconciliation. There were also indications that usage, meaning and interpretation of similar rules, differed by court. I found that customary courts sometimes applied the rules borrowed from Criminal Procedure and Evidence Act (CP&E) in areas that were not covered by Customary Courts (Procedural) Rules. The CP&E governs procedure in the general courts.

Case Processing Times

Case processing times varied enormously between the two courts from a few hours to weeks or months. In customary courts, cases rarely went beyond a day or two whereas in magistrate courts it was unusual to have a case disposed of in less than two weeks. The pattern in the magistrate courts was that contested cases usually took more than two weeks and defended cases took even longer.

In magistrate courts, contested cases took three days on average to conclude once it was clear that the defendant was not going to engage a lawyer. On the whole, cases usually took longer in magistrate courts primarily because most accused persons would generally indicate that they wanted to be given time to look for a lawyer even though very few engaged lawyers in the end. Delays could occur at any stage from the time a matter was listed through the time it was committed for trial, before commencement of trial, during trial stage up to the time when it would be finalized. The delays were often made worse by postponements due to clashes in the diaries of the magistrate, defence lawyer or the prosecution and/or the non-availability of witnesses at critical moments in the trial.

Legal Representation

All accused persons appearing before magistrate courts were advised of the right to engage a lawyer as required. Magistrates were provided with some written guidance on how exactly to render advice on legal representation. Most defendants asked to be given time to do so only to continue later on without a legal representative. In contrast, customary courts did not advise accused persons that if they wanted to be represented by a lawyer they could apply to the Customary Courts Commissioner to have their case transferred to a magistrate. It appeared that customary courts were not entirely happy with the idea of transferring cases and were prepared to do all they could to

frustrate efforts to do so. In any event an application did not necessarily guarantee that a transfer would be allowed and where it was denied or allowed no reasons were supplied for the decision. Transfers are provided for under S. 36 of the Customary Court Act.

Other Rituals and procedures

(a) *Rituals*

There were very few rituals involved in the customary courts proceedings. The general attitude was one of well ordered and respectful informality generally associated with the Kgotla. However, the customary court at Kanye seemed to mimic the magistrate courts in a number of areas in terms of its rituals than the customary court at Mochudi or Lobatse. For instance, the presiding officers would sometimes come to the area where trials were held slightly later than everybody else in the manner of judges in the general court and expect everyone to stand up till he was seated.

Perhaps the most important difference between Customary and magistrate courts as far as rituals were concerned centred on the question of the oath, especially its role and significance in matters of evidence. In the general court oral evidence is given under oath (see S. 219 and 220 CP&E). However, an accused person has the right to make an unworn statement on his/her own behalf (S. 218 CP&E) but such evidence is given less weight than a sworn statement.

Another noteworthy element in the proceedings of the two types of courts was that the use of books and other written matter was much more pronounced in magistrate courts than in customary courts. In the magistrate courts I observed at least two instances where the presiding magistrate asked both the defence and the prosecution to make written submissions, something I was told never happened in customary courts.

(b) *Technical Issues*

One of the major differences in the way the courts operated was that defendants appearing before a magistrate without a legal representative had technically complex issues explained to them, and where appropriate, they were advised as to the technical defences that might be available to them. Defendants appearing before customary courts were not accorded the same privilege.

(c) *Statement of facts and Pleading*

It appeared that there was a considerable confusion in the customary courts concerning explanation of charges to the accused person and taking of the plea. At Kanye I observed that after the prosecutor had read the charge to the defendant s/he would then be asked whether s/he agreed with the statement and if s/he answers 'yes' the defendant was assumed to have pleaded guilty. The court usually loathed to entertain any further protest from the defendant. This was in sharp contrast to what obtains in magistrate courts where the defendant is asked whether s/he understand the statement of offence/facts and then asked how he pleads. The two are asked as two separate questions. In magistrate courts emphasis was on the fact that a guilty plea had to be unequivocal.

(d) *Procedural model: adversarial or inquisitorial or mixed?*

Proceedings in the customary courts tended to follow a pattern that was in some respects similar to the inquisitorial pattern while magistrate courts followed the adversarial model associated with the Common Law tradition. For instance, in customary courts the judge played a far larger role in questioning the litigants than magistrates were given to doing. The inquiring judge is associated more with Continental tradition than it is with the Anglo-American model (see for example Van Koppen and Penrod 2003) At the same time, the process in the customary courts displayed features that tend

to be associated with the latter probably due in large part to the fact that Customary Courts (Procedure) Rules are derived from that model.

(i) Format Preference

It seemed from my observations that the preferred format for rendering evidence in customary courts was the story format. The complainant, who was usually treated as the first state witness, was allowed to narrate his/her story with little interruption after which the defendant was allowed to cross-examine him/her. At some point the defendant would then give his/her own version of events in a similar fashion. By comparison, in magistrate courts a relatively large part of the story was constructed through question-answer format.

(ii) *The Verdict: Telling a Good Story versus Proving Elements of the Offence*

In all the cases observed in customary courts it appeared that to arrive at a decision the court relied primarily on the plausibility of stories/narratives provided by the disputants rather than on whether or not the prosecution succeeded in proving elements of the offence. The story would be followed by a relatively short question and answer session to clarify points in the story or establish inconsistencies. The same pattern would be repeated when the time came for the defendant to tell his/her side of the story. The narrative pattern is closely aligned to the traditional mode that in many instances begins with contestation over the nature of the wrong (see Roberts 1972, Comaroff and Roberts 1981).

Apart from believability of the defendant and the complainant's stories, it appeared that the general conduct and character of disputants influenced the decision to convict or to acquit the accused person. It seemed that as far as customary courts were concerned, the general conduct went to the character of the person and therefore the likelihood of her/him having conducted

her/himself in ways alleged by the other party or the police. Similarly, if an individual belonged to a group whose conduct was generally or specifically disapproved of by the community or the traditional leadership such as young persons or unemployed young persons, that might well count against her/him. These rather than specific elements of the offence were the factors that customary courts considered.

I observed that when a customary court decided to convict, the formulation would take the following general form "this court having listened to and considered the believability of your story (defendant) and that of the complainant/prosecution and/or having considered your general character/honesty as a person, finds you guilty of committing such and such an offence contrary to section such and such of the Penal Code as alleged by the prosecution." This formulation is consistent with the weight that stories tended to be given by customary court decisions.

By contrast, while believability or soundness of the story, and in certain limited instances, the character of the defendant or complainant played an important part in the conviction or acquittal of an accused person in magistrate courts, the critical factor was whether elements of the offence charged had been proved. Typically, when delivering her/his judgment the magistrate would outline elements of the offence that the prosecution would have been expected to prove to persuade the court to convict. Sometimes it happened that some elements of the offence would only be clearly or more fully articulated or even extended in case law rather than in the offence-creating statute in which case the defence lawyer and magistrate would make copious reference to case law in order to establish whether the defendant actually committed an offence in the eyes of the law. The case of *State v Lucky Letshwiti and Bajuta Kesenyeditswe* (MU217/01), observed at Mochudi illustrates this general pattern.

In that case the accused persons were accused of stealing tyres which they, in their turn, claimed they had found abandoned in an open space in their ward. In delivering its judgement the court started by establishing the meaning of theft in the relevant section of the Penal Code which in this case was S. 264: "it is stealing if a person fraudulently and without claim of right takes anything capable of being stolen or fraudulently converts to the use of any person other than the general or specific owner thereof, to take anything capable of being stolen".

The court went on to explain what fraud meant in the context of the offence charged which in this case was found under S. 264 of the Penal Code which further provides that:

> "A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say ...an intent to permanently deprive the general or special owner of the thing of it".

According to the court, "*the actus reus* of the offence is the taking and the *mens rea* is fulfilled if the following conditions are fulfilled: if the taking is (a) without the consent of the owner (b) without claim of right and, (c) fraudulently".

Telling a good story is an important part of a criminal case (Pennington and Hastie 1992, Finkel 2001), the difference between systems often lies in the rules and the assumptions supporting those rules (Wagenaar *et al* 1993, Jackson 1988). These also have influences on how the stories are actually told. However, the mental element and the act doctrine are central to the Anglo-American system (Sebba 1980, Sistare1989; Shears and Stephenson1996).

Burden of Proof

The most common pattern in customary courts was characterised by the gradual shift of the burden of proof/persuasion on to the defendant so that towards the conclusion of the case it would appear that it was not longer the prosecution who needed to prove their case but rather the Defendant who had proof his innocence. This is probably as a result of the general approach of customary courts to evidence (see Kirby 1985; Baillie 1969; Kuper1969) and of Rule 19(h) of customary procedure rules which encourages the court to convict, not based on elements of the offence being proved by the prosecution, but rather based on the failure of the defendant to give an adequate explanation or evidence to defeat the prosecution's story.

Role of Victim

The role of the victim in customary court is rather larger than is ordinarily allocated to such persons in the general system. The victim is not regarded as merely a complainant and witness for the prosecution. The way reconciliation and withdrawal were handled in the customary courts gave the impression that the court believed essentially that the complainant was the ultimate 'owner' of the dispute encapsulated in the often used phrase "mong wa kgang" (owner of dispute) Customary Court (Procedure). Rules appear to encourage this view in that rule 19(a) allows the complainant or his relatives to assume the role of the prosecutor if there is no official prosecutor.

Mediation and Reconciliation

Customary court judges made valiant efforts to mediate or reconcile disputing parties regardless of the stage of trial process. No similar efforts were observed in the magistrate courts. Customary court judges were more likely to intervene in disputes involving neighbours, friends or relatives.

They were particularly keen to intervene in cases where they believed that the offence charged masked dispute relational issues. Complainants in such cases would often confirm that their real objective was admonishment (*kgalemo*) of the errant party and they would often withdraw the case arguing 'I am not here to start a dispute, I just want the chief to mediate/ admonish) (*ga ke atla go seka ke batla kgosi a re agisanye / a kgaleme).* The use of litigation to resolve relational issues is a noted aspect of Tswana uses of dispute (Roberts 1972, Comaroff and Roberts 1981).

6.9 Formalism, conflict and Accommodation: An illustrative case

The case below illustrates contradictions that occur when legal formalism forces customary and general systems to confront their differences in philosophical approach to disputes (Mochudi Magistrate Court Criminal Case *No. 62/01 the State v Richard Bogatsu and others).*

The State v Richard Bogatsu and others

The case was tried at Mochudi Magistrate on the insistence of the complainant; after the traditional authorities made clear they thought the matter should be dealt with rather differently from the way the complainant was proposing.

The accused persons were charged with unlawful assault on the complainant occasioning bodily harm, after they had, in keeping with Bakgatla custom, punished the complaint for absenting himself from his brother's funeral. According to the indictment the accused persons used fists and a whip to inflict harm on the complainant. They denied the charge of unlawful assault. The accused persons were part of a gang of able-bodied men from Mathubudukwane village, known as Diphiri, who would normally be expected to volunteer for the task of digging the grave whenever someone in the village was due to be buried. Diphiri literally means hyenas. There are

no professional gravediggers in villages so able-bodied males are expected to volunteer for the task.

The accused were part of a larger Diphiri gang that refused to participate in the digging of the grave because the complainant and his younger brother had absconded. Diphiri were particularly upset because it appeared that the complainant and his younger brother did not participate in other funerals in the village.

The complainant's father and uncle persuaded Diphiri to dig the grave and promised that the complainant and his younger brother would be dealt with after the funeral. When the funeral was over the Diphiri were asked to find the two brothers and bring them before the elders where, the accused persons would, as was the custom, administer the punishment.

The assault with fists occurred when the complaint resisted attempts to take him to the family compound to be punished. According to Diphiri he became abusive and threatened them with a knife. He however disputed this including any suggestion that he did not participate in the funeral. He claimed that sticks and stones were used to subdue him .The use of the whip took place at the complainant's family compound before elders as punishment for defaulting the funeral.

Amongst witnesses for the defence were the complainant's father who had allegedly authorised the punishment, the local headman and the Acting paramount chief of Bakgatla both of whom were involved in the case at one point or another in an effort to reconcile the disputing parties. The complainant's father testified as to authorisation of punishment in the extant case and the latter testified as to the existence of the alleged custom, permitting Diphiri to punish defaulters.

When the matter was first reported to the police they referred the case to the customary courts where it was hoped the matter would be settled amicably. The complainant felt authorities were trying to deny him the right to have the matter determined by a court of law. Thus the matter was taken to the magistrate court for trial. There was an attempt by the family to frame the dispute as being about duty and relationships. The complainant saw it in narrow terms of a criminal offence, that is, as assault. Thus the manner in which the dispute should be framed was contested from the beginning. The Diphiri case brings out the tension between social practices, if not customary law and state law as well as the clash between group interests (i.e. family, community) and individual rights. In that regard it lies in the fault line between liberal legality and the indigenous legal form.

(i) *Genesis of Dispute*

It appears the immediate cause of the dispute was the failure of the Powane brothers to avail themselves for grave-digging and, more seriously, missing the burial of their deceased brother. However the source of the dispute was related but much broader: the complaint from the rest of the community including close relatives of the two brothers was that the latter had not been attending funerals in the village. The first defendant cast the complaint in these very broad terms:

> "The complainant's parents asked to dig the grave and indicated thereafter the complainant would be called and asked to explain why he did not participate in other villagers' funerals. It was not his first time to default."

It appears that Diphiri decided that the only way to put an end to the behaviour of the complainant and his brother was to put pressure on the family by refusing to co-operate with them in the digging of the grave. It was common course that the complainant only came back from Gaborone where

he worked as a security guard on the Friday before the burial the following day. The villagers would have considered his late arrival on the scene reprehensible in itself because Gaborone is less than a hundred kilometres from his home village. His decision to come back so late in the week would have meant that he had not taken part in the activities that would have taken place during the course of the week. Indeed several of the defendants accused him of not taking part in the slaughtering and skinning of a beast that was to be consumed at the funeral.

(ii) *Escalation of dispute and attempts at resolution*

When Diphiri had decided to withdraw their labour because of the behaviour of the two brothers the complainant's father was called to the grave site and appraised of the situation. He was, able, together with, the two brother's uncle, to prevail upon Diphiri to discharge their function. He promised Diphiri that the two brothers would be called to explain their behaviour to Diphiri after the burial.

After the funeral Diphiri raised their previous complaint with the Mpowane brother's father who then proceeded to the complainant's compound to look for his sons. The brothers refused to go back to the family compound with him where Diphiri and elders from the community were waiting for them to come and account for their behaviour. Their father then sent Diphiri to go and collect his sons but they had already left the complainant's compound. They were found drinking in a bar in another part of the village. The complainant apparently received some injuries to his face when Diphiri tried to subdue him in order to take him and his brother to the family compound. His younger brother did not try to resist and as a result did not suffer any injuries.

The brothers were handed over to their parents and after some kind of discussion it was decided that the brothers would receive two strokes each. Diphiri were asked to choose someone amongst them to administer the strokes and they chose accused number one to do that. According to the defendants the complainant's father told them that if they were approached by the police concerning punishment of the two brothers they should refer the police to him as he was prepared to take responsibility for ordering that his sons be punished. The complainant went to the police to report that he had been assaulted and punished by the defendants. The police issued the complainant with a medical report form to take to the nearest clinic or hospital so that details of his injuries could be properly recorded by a medical officer. So the two strokes together with injuries received during the incident prior to that became the subject of the court case that was to follow.

It appears that when the matter was reported to the police they wanted to seek clarification from the headman regarding the custom that allegedly allowed Diphiri to punish defaulters. Upon hearing this, the headman called the complainant's father to the Kgotla to explain what had happened and his story was broadly similar to that given by the defendants during the trial. He confirmed, as he was to do again at the trial, that he had sanctioned the punishment of his sons.

When the police suggested that from the point of the law an assault had occurred the headman suggested the case should be brought to the Kgotla for trial before him. However he was adamant that under customary law Diphiri were justified in punishing the two brothers. There was an attempt to mediate between the parties which the police seemed anxious not to undermine but that did not go down well with the complainant who saw it as an attempt to frustrate his search for justice. Nevertheless the complainant and the defendants together went to see the Acting Paramount Chief to get

clear guidance on the issue of the custom. The latter confirmed that Bakgatla custom allows Diphiri to summarily punish those who default from grave-digging. The complainant was still not satisfied so he asked the police to take his case to a magistrate court instead. This essentially meant that the matter entered a new frame: it was no longer about the complainant's behaviour but the allegedly unlawful conduct of Diphiri.

Interpretation of Dispute: The Chiefs' Perspective(Interview)

Question: What is the proper way of dealing with cases like Diphiri?

'The Setswana way does not recommend hasty formalisation of disputes through the Kgotla (Customary Court). Often the matter is first discussed at family level – because really a case like this is a family dispute- a matter for the family. This is quiet clearly a family matter. I believe at the Kgotla the case would be closely examined to see who is in the wrong and the Kgotla would take a dim view of anyone who spends his time in bars while ignoring his duty to the dead. In my view this is not a matter which the courts ought to entertain'.

The only point the chief's representative could concede was, ' Diphiri exceeded their authority by using sticks and stones when the complainant offered some resistance when they tried to take him back to his father's compound, but properly administered punishment would have been within the scope of customary law'.

Question: What do you think of such cases?

They are legitimate as far as I am concerned. Punishment of someone who has erred in the eyes of the villagers is intended to redeem him as a human being. In the case you are referring to it was the complainant who had lost a relative but he seemed unconcerned. Whilst the rest of the village gathered at his parents compound to pay their last respects and help with

preparations for the funeral he thought he would rather spend his time in the bar drinking. He was being called to order here.

Question: But wouldn't you say the action taken by the villagers was illegal?
Answer: 'Yes received law says it is but in terms of customary law it is not. Setswana law does accommodate such things. I think Setswana law and received law should be properly aligned to avoid such conflicts'.

Question: How can these laws be aligned?
Answer: 'That is difficult a question – I think what probably could be done- is for the other courts- the government courts- and customary courts to set up a forum where laws could be examined to see how they could be harmonised. If possible there should be a gentlemen's agreement for each type not to interfere with the other's way of doing things. In that way when the community has dealt with an errant individual according to Setswana custom/law like in the case we have been talking about then there wouldn't be any problems'.

NB: The Diphiri tradition is no longer alive in the main village (Mochudi) but it has been maintained in the outlying villages.

Magistrate (Interview)
Question: How sensitive are the general courts to the values of the local community?
Answer: 'The law does not exist in a vacuum. The societal aspect of it should not be forgotten. But also if our customs and traditions are repugnant to or inconsistent with the national law – the constitution- they cannot be enforced'.

Looking at the Diphiri case, the problem we had is that it is a cultural practice, which is supposed to be observed, and the Complainant in this case did not observe the practice and the villagers proceeded to mete out their own form of justice on him. It was not authorised by an appropriate authority – a competent authority like a headman having duly sat and ordered how it has to be carried out in a more humane way as it were. In this case it was like they took the law into their own hands.
He had erred according to customary law but the way it was now carried out was repugnant to the Constitution, which says that a person should not be subjected to inhuman and degrading punishment.

There was no supervision as to how corporal punishment was to be carried out – he had erred yes but it was supposed to be carried out in a proper manner. Our condemnation was with regard to the way it was handled because even the Paramount Chief came and said yes, it is part of our custom. But it was to be presided over by a competent authority to say, "You have erred and this how we are going to deal with your case". The Diphiri wanted to mete out on their own –it might lead to disastrous consequences – death of a person, serious injury to a person- because the infliction of punishment is not supervised by anyone – there must be someone to say we should stop here like they do in cases in the customary court. If they just do it on their own – it is not supervised – it should not be done by the alleged complainant or those who feel that he has violated the custom – that was our point of departure.

<u>Accused Persons Perspective (Court Interactions)</u>

Accused Number 3:

"Is not our practice and custom that if someone does not co-operate with the community he is supposed to be whipped? If somebody refuses to be one of the gravediggers the punishment for that person is lashing".

Prosecutor: "When somebody has defaulted from digging who authorises the lashing?"

Accused No. 3:"The gravediggers are the ones who can make such a decision on the defaulter. However in this case the complainant's father gave them permission".

Prosecutor: "Do you know that to assault someone is an offence?"

Accused No. 3: "When you assault someone it is a crime but if the person concerned is a gravedigger it is not an offence".

Prosecutor: "Where does the lashing of the defaulter on the digging take place?"

Accused No. 3: "Wherever the gravediggers find it fit to do so whether it is at the cemetery or at home".

Views of Headman (Courtroom Interaction)

"I was not at the funeral and I cannot exactly state to the court what actually transpired. What I remember is that the accused persons at one stage came to my office with a certain Mr Mpokong on the complaint that Mpokong had been assaulted. They explained to me how he came to be assaulted.

In response I explained to Mpokong that it is in fact true it is our cultural practice that if a man fails to be part of those who went to dig a grave, which are commonly known as Diphiri they have to be whipped".

Context of Dispute

Before I go on to consider specific aspects of the dispute process as they relate to the present case I would like to comment on aspects of the social context which make matters at the heart of the case so important.

State v Bogatsu and others revolved around social relationships and the duties and obligations that attach to such relationships. The conflicts leading to the present case centred on the apparent failure of the Powane brothers to attend funerals in the village. It was the default from their brother's funeral that evidently brought matters to a head. When Diphiri resolved not to co-operate with the family in the digging of the grave the Powane brothers' father found that the only course of action open to him at that point was the promise to have his sons punished after the funeral was over. The sons were clearly not young persons still under the care of their parents but rather adults, at least one of whom, notably the complainant had a compound of his own. He was aged 24 years of age at the time of the trial. Thus we see the family acting in concert with Diphiri to enforce conformity with norms.

Attendance of and participation in the burial of a departed relative is something Batswana take extremely seriously. As is the case with a marriage, a funeral provides the opportunity for the affirmation of ties among family and kin by mere presence as well as through the performance of assigned roles and rituals associated with death. The rest of the village, or ward in the case of large villages, is expected to come to the compound for prayers every evening until the eve of the burial day when an all-night wake is held. Preparations for the funeral usually take anything between a week and two weeks and the family spares no expenses to feed the crowds that come to pay their respects to the dead person. Depending on the circumstances of the family concerned, one or two beasts and several goats may be slaughtered in the period leading to and including the day of the burial.

Because of the range and scale of activities involved, able-bodied men and women from the community at large are expected to help out and they are generally guided by members of the family as to how they may assist. Digging of the grave is one of the activities that require the participation of

villagers at large. How the team responsible for digging is organised varies somewhat between communities but some communities like the community in the present case still follow the old pattern where young men are, on the pain of punishment, expected to participate. It is even more serious therefore for any member of the affected family to default from grave-digging because it will be perceived by many people as undermining social relations and social cohesion in the sense that it threatens established patterns of co-operation and reciprocity of support in the village. So breach of norms such as that which occurred in present case sets the stage for further escalation or de-escalation of the conflict until a point of resolution is reached.

Analysis: Formalism and customary court processes

The case of *The State v Bogatsu and others* discussed above illustrates how legal formalism has transformed the Tswana dispute process. The possibility of contestation over the construction of the dispute which has always been an integral part of the dispute process in customary courts has been excluded by the requirement that the conduct complained of must constitute an offence under written law. Customary law allowed both disputants, not just the complainant, to frame the dispute especially where there was disagreement over the exact nature of the dispute (Comaroff and Roberts 1981, Roberts 1972). In other words disputants could negotiate to decide what exactly the dispute was about.

Under current arrangements it is required that if a complainant wants to initiate a criminal proceeding the complainant must report the matter to a court clerk or a police officer who must satisfy him/herself amongst other things that the conduct complained of constitutes an offence under the law. Thus the agent to whom the matter is reported becomes the arbiter on the nature and boundaries of the dispute. The assumption underlying this model is that the nature of the dispute must be determined before the proceedings

start. This model of dispute processing is based on the legal formalist approach of the common law courts but all courts including customary courts are expected to follow it. However, before the 'unification' of substantive criminal law the general scheme of the dispute process in customary courts offered various entry points into and options in the construction of the dispute. Contestations over the framing of the dispute are excluded by the written law test and formalisation of the laying of charges. This issue has from time to time caused a great deal of friction between indigenous and received courts as well as between the traditional leadership and politicians. Customary courts and disputants often find that the formal process excludes and undermines to a great extent negotiability of disputes in the broad sense of the term. Thus in the eyes of customary courts the substance of certain disputes is considered malleable and negotiable so that it is conceivable for a dispute that began its life as a criminal suit to the cross boundary altogether to be determined more or less as a civil dispute.

The first problem is that the dispute framework within which both customary and magistrate courts are expected to operate (described above) is based on legal formalist approach of the common law courts. While it is technically correct as an account of what should happen and what probably happens in the majority of cases it neglects the process of dispute construction. The formal process excludes and undermines to a great extent negotiability of disputes in this broad sense.

Secondly, the problem is that the model appears to assume that crimes that are similar at a formal level (indictment) in the sense described in the opening statement of this introduction are normatively similar on every level save for the influence of evidence and procedure rules. Is it justified to assume that if apparently similar offences were tried in customary and magistrate courts they would be uniformly similar at normative level

(principles and meaning-structure) across offences, the influence of procedure on substantive law, notwithstanding?

6.10 Findings

Finding6A: Compared to customary court judges, magistrates engaged complainants and defendants in the reconciliation process, whether formal or informal, rather far less than the former.

Finding 6B: Compared to magistrate courts, customary courts did not appear to concern themselves with elements of the offence except in an indirect way through the stories told to the court by the defendant and the prosecution. Not only did customary courts appear not base their convictions on an analysis of the elements of the offence but they also did not refer to any case law explaining the meaning of or principles underpinning their decisions.

6.11 Summary

As far as processes are concerned, a number of differences between the two legal systems that could potentially affect outcomes emerged. These included procedural and rule-related differences such as whether defendants were allowed to engage a lawyer and whether they were advised by the court as to the availability of technical defences. Lawyers were allowed to represent their clients in magistrate courts and those who did not have a legal counsel were advised by the court as to availability of technical defences while those tried before customary courts did not have access to both.

There was also a large difference in the case processing of the two types of courts. Magistrate courts almost invariably took longer to process cases than customary courts. There were also some interesting and significant differences in the way the protagonists in these courts presented their evidence and how the court arrived at a verdict. With respect to presentation the structure of presentation in magistrate courts was predominantly question-answer whereas in the customary court it was the story format that

dominated. As regards proof, customary courts tended to rely heavily on believability of complainant's/defendant's story while magistrate courts wanted elements of the offence proved before they return a guilty verdict.

Another important difference in the way the courts dealt with cases generally was that customary courts judges went to great lengths to try and mediate between the disputing parties, and where possible reconcile the parties. They were prepared to do this before commencement of trial, during the trial or after the trial particularly where they felt that the charge the defendant was being tried on was not the 'real' issue. The case of Richard Bogatsu and others v State most graphically illustrates the difficulties engendered by legal formalism both in terms of framing disputes and their negotiability.

6.12 Conclusion

This chapter has presented and examined data from interviews with court staff and from court observations in customary and magistrate courts at three different sites. Interviews were intended to provide an insight into the organizational dynamics of the courts from the perspective of the agents who drive the court process, namely court staff while court observation provided information on rules, court processed and rituals that possibly impact on outcomes of cases that are processes by the courts.

CHAPTER SEVEN

7.0 INTERVIEW: DATA PRESENTATION AND ANALYSIS

In this chapter I present and discuss qualitative data from the study collected using interviews. The chapter summarizes and discusses the background of court personnel as well as processes and organizational dynamics of the courts as seen from the perspective of the subjects. The precise issues considered in the chapter were selected based on pre-defined indicative themes and themes that emerged during interviews as the most intensely or extensively discussed.

7.1 The Role of Interviews

Consistent with the Concurrent Nested Strategy (CNS) as described in the methodology chapter, the interviews served to complement quantitative data by giving us an insight into issues surrounding criminal trials in customary and magistrate courts from the perspective of key court personnel. As Kvale put it, the qualitative interview "attempts to understand the world from the subject's point of view, to unfold the meaning of peoples' experiences, to uncover their lived world prior to scientific explanations" (Kvale 1996:1).

In this study the interviews were intended to solicit the subjects' views regarding court processes generally, including personal and organizational factors that form the context for the exercise of decision-making powers by customary and magistrate court judges. More specifically, the exercise entailed delving into the background, training and role perception of presiding officers and other key court personnel. As it became clear that the problems surrounding technical skills and other competences were considered by the subjects to be the most serious challenge facing the courts, the interviews focused more on the views and impressions of these officers regarding their own, and other key personnel's effectiveness in performing

their assigned functions in criminal trials. The significance of another theme, namely the relationship between customary courts and higher bodies responsible for appeals or reviews became apparent during early interviews. As such it became imperative to interview officers in the review and appeal structures so as to hear their views regarding the nature of the relationship between these bodies and customary courts to the extent that such a relationship had a bearing on the outcome of cases. Accordingly a Member of Customary Court of Appeal and Assistant Customary Courts Commissioner were incorporated into the list of potential interviewees.

7.2 Selection of Respondents

Selection of subjects for interview was based on convenience/purposive sampling. In the present study it meant using as subjects some of the officers that I met during court observations. In that way convenience sampling was judged to be less time consuming and less costly than other approaches especially that interviews had to be done concurrently with the census survey and court observations. This obviated the need to find additional sites purely for sampling purposes. So the interviews were conducted at the main site, namely Mochudi, and the two pilot sites of Kanye and Lobatse. Only two interviews were conducted outside these three areas. Those interviews involved the two individuals working in higher bodies responsible for review of and appeals from customary court cases who were interviewed in Gaborone, the capital city, where they were based.

The following court personnel were interviewed for purposes of this section: Court Clerk(2) , Court Recorder(1), Interpreters(1) Local Police(2), Botswana Police(2), Assistant Customary Courts Commissioner(1), Member of Customary Court of Appeal(1), Customary Court Presiding Officers(3) and Magistrates(3). The above list does not necessarily include all officers in the various cadres who worked at the three sites at the time of the study.

All the officers selected had, with the exception of the Court Recorder, the Assistant Customary Courts Commissioner and Member of the Court of Appeal, been involved in at least some of the cases that the researcher actually observed during the course of the study.

7.3 The Interview Process

Interview data was captured using an audio-tape and by means of hand-written notes. A semi-structured interview instrument with indicative themes and questions was used as a guide. The semi-structured nature of the interviews allowed us, as the discussion that follows shows, to pursue new themes as they emerged whether as a result of probing or as a result of events which I believed provided an opportunity for greater insights into the normative practices of the two types of court such as the case of *State v Bogatsu and others.*

7.4 Data Analysis and Presentation

Various materials from interviews are presented using three different formats in this section. First, material relating to biographical profiles is presented on its own in tabular form in order to provide a general picture concerning the experience, skills and level of education of key court personnel. As the sections that follow indicate, these areas emerged as dominant themes in both courts. Second, case studies are used to provide an in-depth view of the experiences and perspectives of selected individuals regarding various themes/issues. Third, to conclude analysis of interview material, a summary based on general interview data covering various themes contained in the indicative interview instrument including themes that emerged during the course of the study or interview, is presented.

7.5 Data Analysis Procedures

The approach adopted in this part of the study for purposes of data analysis blends different strategies. As a rule researchers tend to approach analysis of qualitative data in one of two ways. They either employ a specific approach,

for instance grounded theory or prefer an approach that combines elements from a variety of approaches (Thomas 2003). Those who prefer the latter route generally avoid giving a label to their approach. This study follows the latter approach. I did this primarily for two reasons. First, the study generated a large amount of qualitative data owing to the use of more than one method to capture interview data though it must be said that it is not unusual for qualitative methods to produce dense data. Still, analyzing the data provided a significant challenge due to the amount of information generated. Second, the semi-unstructured nature of the interviews meant that themes multiplied or diverged from indicative thematic guidelines as the interviews developed. Thus I considered that data would be more usefully dealt with by borrowing from different approaches without committing to a specific label.

In practical terms it meant the analysis process started with data reduction (Miles and Huberman 1984:24, Miles and Huberman 1994:10) and thematizing (Kvale 1996:83) both of which involved a series of steps including the following:

1) Summarizing information relating to different questions and themes so as to determine the direction and thrust suggested by each thematic thread.
2) Transcribing the taped version of the interviews for detailed analysis to enable the researcher to pick out new or promising threads.
3) In the case of interviews with customary court personnel, transcribing was followed by translation of interview material from Tswana into English.
4) Selection of excerpts that succinctly captured themes or views of respondents regarding a particular theme/issue.
5) Selection and evaluation of material for case studies.

7.6 Guideline/Indicative Themes

A number of indicative themes for interviews were developed at proposal stage to guide the research process based on literature review (Chapter Three) and the researcher's own knowledge of the two systems. As might be expected, at that stage the researcher's knowledge of some aspects of the trial process in magistrate and customary courts was not yet fully formed. Certain indicative questions turned out to be too vague and general to be of much use and so had to be discarded. Questions relating to urban courts became redundant as well following a decision to exclude urban sites from the study. Early interviews led to a review of questions and a change of focus in subsequent interviews (see Miles and Huberman 1994). In terms of the original instrument, the interviews covered the following themes:

i) *Biography*:

This part of the instrument was concerned with demographic information and the general profile of the subjects as it related to their work in the criminal justice system and beyond as well as their perceptions regarding these.

ii) *Role Perception*:

Questions under this heading were intended to provide an insight into the interviewees' appreciation of their own role in the trial process.

iii) *Range of Power*:

The aim here was to obtain information regarding the extent of the sentencing powers individual presiding officers of the courts covered.

iv) Views on the Interface between Customary and General Courts

The aim of the questions under this heading was to find out about the general relationship between the courts as well as the attitude of key court personnel of one type of court to the other.

v) General Views on the Criminal Justice System:

Under this section the subjects were given the opportunity to make more wide ranging comments about punishment and the criminal justice system generally.

It was hoped that taken together the above themes would enable us to begin to appreciate how the two systems diverged or converged, if not at the level of normative practice then at least in terms of normative views of key court personnel.

7.7 Emerging Themes

Even though the indicative themes outlined above and specific questions falling under those themes guided the interview process (see Silverman 2000, Jorosi 2004), they developed in ways I had not anticipated during the actual interviews. The semi-structured nature of the interview instrument allowed the direction of the interviews to be influenced by events that were observed or that occurred during the course of the study. Sometimes these new ideas developed into independent themes. As indicated in the preceding sections, some sub-themes fell away during analysis as some of the questions proved not to be relevant or useful. This in turn necessitated a review of themes as data analysis proceeded.

Thus ultimate importance of any particular theme was determined to a considerable degree by information obtained from early interviews which pointed us in the direction of critical issues. New themes and ideas were picked up or pursued depending on their relevance to the goals of the

study and as well as on the intensity and depth of interest displayed by the subjects in relation to those particular issues or themes. I found that there were differences between the two types of courts as regards the degree of emphasis on or predominance of particular themes and issues over others.

7.7.1 Other Salient Themes

The most important unusual or unique event out of which developed several thematic threads was the case of *State v Bogatsu and others*. However, because the case appeared to highlight some of the areas of difficulty brought about by 'unification' of criminal law, the judges of the two courts at Mochudi were asked for their opinions regarding the case. Several features made the case unique. First, it followed a classic pattern of the Tswana disputes in cases revolving around familial relationships as described by Comaroff and Roberts (1981 chapters 3,4 and7) in *Rules and Processes* in that there was a major disagreement regarding whether the dispute was about family relations or alleged assault. Second, it brought to the fore a welter of issues that define and characterize the relationship between the two systems on the one hand, and between these legal systems and the local communities they serve on the other. More abstractly, it highlights the tensions in the relationship between legal cultures and social cultures as well as issues of value conflict between the two legal systems arising from legal formalism.

7.8 Case Studies

The case studies were intended to provide focused narratives and analyses of various themes based on perspectives of selected individuals. As a research method the case study may take different forms and according to Yin (1993:xi), it is the appropriate method to adopt "when an investigator desires to (a) define topics broadly and not narrowly, (b) cover contextual conditions and not just the phenomenon of the study , and (c) rely on multiple not singular sources of evidence." It may be surmised from the

stated aim of the case studies outlined in the opening statement of the present section that in this inquiry the primary emphasis was on (b).

Because of limitations of space, the case studies under consideration in this section cover only two individuals, namely the presiding officers interviewed at the main research site, one from the customary court and the other from the magistrate courts. However, there was not much to separate one customary court judge or magistrate from another as far as their views regarding substantive issues were concerned. Material from the case studies was incorporated into the summary based on all interviews presented in closing section of this part of the study.

7.9 A Summary of Profiles of the Interviewees

Table 22:

Designation	Age & Gender	Education level	Duration in Current Job	Previous Job	In-Service Training
POMI	35 (Male)	Degree (2 BA Laws)	12yrs	Magisterial Assistant (1yr)	Annual workshops & Training
POMII	29(Female)	Degree(LLB)	6months	Private Practice	Induction by POMI
POMIII	37	LLB	11yrs	None	Workshops
POCI	58 (Male)	Standard 7 (primary)	11yrs	Wild Life Officer (1964-90)	3 Weeks Course, 2 workshops in 11yrs
POCII	58 (Male)	Vocational College	29yrs	Agricultural Demonstrator, Builder	None
POCIII	63 (Male)	Standard 6 (Primary)	?	Retired Civil Servant	None
BPI (Sub-Inspector)	36 (Male)	O' level	Joined BP in 1985 (16yrs) Prosecution since 1999	None	In-service training for police prosecutors
BPII (Inspector)	30+	O' level	Joined BP in 1992 (9yrs) Prosecution since 1997	None	None but 2day workshop
LPI (Sub-inspector)		Certificate in Law	Joined LP in1994	?	?
LPII (Superinten	50 (Female)		Joined LP in 1979	Cleaner	None

dent)					
CCLCI	43	Certificate in Administration	26yrs	None	1 month course
CCLCII	24 (Male)	O'Level	1 and half years. Joined in 2000	Unemployed	None
INT I	25 (Female)	O'Level	1and half years Joined 2000	Unemployed 1996-97 Temporary worker in private companies since 1998-99	None
ASCCM	59	Certificate in Law	11years	Court Interpreter, Court clerk	None
CCAPM	72	1	12 years	Retired civil servant	None

Keys: POM: Presiding Officer Magistrate; POC: Presiding Officer (Customary); BP: Botswana Police; LP: Local Police; CCLC: Court Clerk (Customary); INT: Interpreter; ASCCM: Assistant Customary Courts Commissioner; CCAPM: Customary Court of Appeal (Member).

Overall most officers had not undergone technical training to a recognized professional level even in their own field. If we exclude presiding officers, prosecutors were the most likely to have received broadly relevant training though whether the training was adequate or not is a different matter. A few officers had received training of some sort at workshops and other forums, even that type of training was designed by or for their own department. These training exercises tended to be short. Even so, quite a number of court staff had not received training of any description at all.

Amongst presiding officers, only magistrates had undergone training to a professional level. The customary court president who had received any training at all had received only rudimentary training. All the three presiding officers had worked as civil servants at one point or another in their lives. While the other two indicated had not received any training, the presiding

officer at the Mochudi said he had received general training for his role as a presiding officer.

Case Study I: Presiding Officer Magistrate I (POMI)

Biographical Narrative

POMI, was an expatriate lawyer from one of the neighbouring countries who was working as a magistrate at the time of the interview. He was the most senior magistrate based at Mochudi at the time of the study. POMI worked along side another junior expatriate lawyer, POM2, whom he was inducting into the job. POMII had evidently been sent to Mochudi to replace another magistrate who had been sent to another district on transfer. At the time of the interview, POMI had been working as a magistrate for 12 years and was only a few days from his 35th birthday. He had previously worked as a magisterial assistant. POMI indicated that he held a Bachelor of Law (honours) and a Bachelor of Law.

Role of Magistrate in Undefended Cases

According to POMI, a magistrate has an onerous obligation to explain to the accused person special defences that may be available to the accused and also explain to him/her procedures as the person may be overwhelmed by the atmosphere of the court in cases where the accused person has not engaged a defence lawyer. He explained:

> "Some are just illiterate so the court has to go out of its way to ensure that the accused person gets a fair trial. Of course when the accused is represented the court takes it that the lawyer will do a competent job because he is a professional".

Training and performance of key court personnel

POMI believed that the performance of both prosecution and interpreters was well below what might be expected for magistrate courts because they

were not trained to a professional level in the requisite areas. He reserved the harshest criticism for prosecutors whom he suggested regularly failed victims of crime and must be withdrawn from magistrate courts at the earliest opportunity. According to POMI the weaknesses of police prosecutors were often exposed in defended cases and often there was nothing the court could do to help:

> "Although the court is not like an umpire in a game of tennis it cannot be seen to be directing him to how he should go along with his case–how he should proceed- even if you can see that the case is going down the drain. There are certain instances where the court can do that but where it goes to lack of training then it's something else."

POMI said police prosecutors including senior officers sometimes failed at even very basic prosecutorial functions such as applying for exhibits especially documents to be admitted into evidence.

In POMI's view interpreters lacked appropriate training thus comprising the quality of justice in magistrate courts:

> "Any poor interpretation on the part of the interpreter might cause an otherwise guilty person to go scot free or even an innocent person to be convicted. There has to be accurate and proper translation of the proceedings by the court interpreter. The duty of the interpreter is to accurately and honestly translate the proceedings so that the accused person, the witnesses and the court can follow what is happening".

State v Bogatsu and others (The Diphiri Case)

As it happened POMI was the presiding officer in the Diphiri case, so I asked him to comment on some aspects of this unique case as soon as it was

concluded. The case was important in that it illustrated sharply some of the normative concerns in Botswana's dual legal system at the heart of this study. A little background is necessary here.

The case started as an informal family/community matter concerning two brothers who were thrashed on the orders of their father because they did not attend funerals in the village, including that of their own sibling. The villagers had decided not to assist the family to dig the grave for their relative until the dispute with the family had been resolved. They only agreed to co-operate after the father promised them that his sons would be dealt with according to custom after their brother had been laid to rest. After the funeral the grave-diggers (Diphiri) were instructed to bring the two brothers to the family compound to be punished. The family decided that they should be given strokes as punishment. The grave-diggers were asked to administer the strokes. One of the brothers believed that the punishment was illegal so tried to lodge a complaint of assault against the grave-diggers at the local customary court. But the presiding officer there refused to entertain the matter arguing that it was Kgatla tradition to punish men who failed to attend funerals in that way. He referred the disputants to the Chief's court but that the court took the same view as the lower court so refused to try the case as a criminal matter. It was subsequently tried before a magistrate court. Both the two types of courts and parties on the different sides of the disputes could not agree whether the dispute should be regarded as a family matter falling outside the purview of criminal law or as a matter involving criminal wrongdoing.

Apparently aware of the social implications of the case the magistrate court stopped short of a conviction, as it is allowed to do in cases where it considers it may not be expedient to go all the way (See S32(1) PC). Asked why the court did not proceed to conviction POMI said that the court had to

be sensitive to social aspects of cases as the law does not exist in a vacuum. He noted that at the same time if customs and traditions of a community are repugnant or inconsistent with national law they can not be enforced. In his view the problem in the Diphiri case was that the defendants had not been authorized by the appropriate authority like a headman having duly sat and ordered how punishment was to be carried out in a humane way. However, he also believed that the complainant had erred in failing to observe a cultural practice that was intended for the greater good.

Case Study 2: Presiding Officer Customary I(POCI)

Biographical Narrative

POCI became a presiding officer in 1990 after retiring from the civil service. At the time of the interview he was in his 60s and had been a judge in the chief's court for eleven years. As part of the preparation for his role as judge he had attended a 3week course, which as far as he was concerned, was completely inadequate preparation for the role.

Training and performance of key court personnel

POCI saw poor performance of some customary court judges and police prosecutors as one of the critical issues facing customary courts today. In the case of the former he suggested that there was direct relationship between performance and training. According to him an induction course such as the one he had undergone himself lasting three weeks was far from adequate considering the responsibility that presiding officers must shoulder. Accordingly it was important to train court clerks as well to ensure that they would be in a position to rescue unskilled and ineffectual presiding officers:

> "I think they must be taught about cases –even if it is a short course –to learn about cases to be able to guide presiding officers

if they seem to be in danger of going off track. That would really help."

POCI also believed that it was essential to train court clerks if only to motivate them to work harder.

As far as police prosecutors were concerned POCI suggested that the problem was not simply that the officers were poorly trained but rather that they were invariably junior officers whom he felt were more likely than senior officers who prosecuted in magistrate courts, not to be properly trained. POCI asserted that officers assigned to customary courts simply did not know how to conduct cases which indicated that their training probably lacked depth.

Punishment of Women and Young Persons

POCI had some fairly strong views regarding the exemption of females and certain sections of the youth persons from corporal punishment. In his view not only did these restrictions interfere with the traditional way of doing things but they blunted the effect of punishment to a point where it had lost meaning and was no longer a deterrent to errant youths. POCI suggested that the process of dealing with young offenders was faulty from the start. According to him, under existing arrangements those aged 17 or under were not really subject to a trial in the proper sense of the word since they had to be tried in the presence of a Social Worker and other considerations came into play when it came to sentencing: " for instance, where a young offender might have been sentenced to corporal punishment or a term in prison were S/he an adult, S/he would instead be returned into the care of a Social Worker."

In POCI's view this way of dealing with young offenders was at odds with Tswana culture as it makes it difficult to use corporal punishment in the traditional manner:

> "We have a problem with this approach. According to our culture we consider that corporal punishment helps build the character of young people."

POCI believed that the effect of the prohibitions or restrictions on the use of corporal punishment on young persons under the age of 18 and females generally (S17 (2) CCA), was that these groups engaged in anti-social and criminal conduct in the knowledge that corporal punishment did not apply to them and in the case of the former, knew their parents would pay any fine that the court might impose as punishment on their behalf. He further noted that when gender intersected with age, as was the case with respect to girls, the menu of penalties available to the judges became even narrower:

> "When it comes to sentencing you might find she is underage, and as result the choice of penalties available to court is even more limited so you are not able to impose punishment you consider appropriate for that case. You cannot, for instance, sentence her to thrashing, even if that would, in your view, have been the appropriate remedy because the law does not allow it. All you can do is sentence her to a fine, and if she defaults she goes to prison. But the department of prisons has been complaining time and again that prisons are full which means the only available penalties are the fine and corporal punishment. But the law prohibits the infliction of corporal punishment on girls and women."

POCI said he did not believe that girls should be exempted from corporal punishment as they had the propensity to get involved in crime especially

theft-related crime, just like the boys, sometimes even breaking into people's houses on their own or together with boys. However, he observed as a general point that since moving to Mochudi he had come to believe that the most common theft-related offence committed by girls was shoplifting. According to him, existing restrictions made it difficult to use punishment to mould the character of young girls to the same extent that the courts were able to do with boys over the age of 17. He thought that a combination of a suspended prison term and thrashing was being used with some success on boys. However, he still felt that the approach of customary courts to the problem of wayward youths was comprised by the dominant law "as a result sometimes you find you are really just doing what the law says."

But POCI believed that these were not the only factors that made it difficult to find the correct penalty or arrive at the correct balance of punishments to fit individual cases. According to him, there were other factors, the most serious of which was overcrowding in the prisons. He said overcrowding meant that the courts had to resort to strokes/thrashing more often in order to ease pressure on the prison system. Incidentally the Penal code has been recently amended to allow more extensive use of corporal punishment as a substitute for imprisonment (Penal code (Amendment) Bill 2004).

POCI observed that when all these problems were taken together the effect was that there was no real difference between the way the general courts and customary courts dealt with offences. However, he indicated that he would like to see customary courts being given more leeway to punish offenders, especially young offenders, according to their own philosophy.

Withdrawals and Reconciliation

POCI said that withdrawals and reconciliation were to be expected especially that disputes often involved people who were closely related in one way or

another. In his view customary courts were generally sensitive to this as they often allowed disputing parties to settle matters at home where possible. He observed that:

> "Disputes sometimes develop within the family and one of them may, in the heat of the moment run off to lodge a complaint which then becomes a court case. It often happens that they reconcile before formal adjudication takes place and ask that the case be withdrawn because they have or believe they will resolve the dispute at home".

On the other hand he observed that pressure to dispose of cases quickly meant that presiding officers had little time to find out about issues surrounding individual complaints as they might have done in the past and as a result it might appear to the casual observer that they did not generally do enough to push complainants and defendants to settle disputes outside court. He said, however, that he believed that it was always better to find less acrimonious ways to settle disputes than through court cases especially where the misunderstanding involved family, friends or neighbours.

Customary Courts and Appeals/ Review Bodies

POCI was categorical in his view that the reviews conducted by the District Commissioner (DC) did not anyway benefit customary courts, if anything they were, in his opinion, a hindrance to the work of traditional leaders. Section 38 of the CCA invests District Commissioners (subsumed under the category of Administrative Officer), in their capacity as magistrates, with revisory powers over customary courts decisions. POM said that, in his view, DCs had little understanding of customary courts' decisions since handling cases was not their primary function. He gave the following example to drive the point home:

> "There was a case recently involving a young man who used insulting language against his mother and even man-handled her. But the DC freed him so the DC's reviews are for us not satisfactory."

POCI further argued that in any event DCs had no legal training. He said he believed that magistrates should review cases from customary courts otherwise cases should be sent to the Customary Court of Appeal as that would be more acceptable to customary courts.

State v Bogatsu and others (The Diphiri Case)

It was POCI's belief that the Diphiri case demonstrated clearly that there was a misalignment between customary law and received law in some areas which needed to be addressed urgently. I asked POCI to comment on the Diphiri case to get his views on cases of this nature generally and if he was aware of the specifics of the case to discuss the implications of its various aspects for the customary system. As is it turned out he was aware of the case as the headmen of the village where the case originated had referred the disputants to the chief's court when he found it too difficult for him to resolve. As one of the senior tribal leaders based at the chief's court he had been consulted by the regent about the case.

POCI saw Diphiri as part of a wider failure of criminal law to adequately address the problem of disorderly or unbecoming conduct among the youth, generally. He said he did not believe the accused persons had acted unlawfully in terms of Tswana law but only in terms of received law.

7.10 Summary: Interviews

The Most Important Issue Confronting Customary and Magistrate Courts was Training

Training was considered by all interviewees to be the most critical issue facing customary and magistrate courts. The relationship between poor, inadequate or inappropriate training and performance of key court personnel emerged not only as the most recurring theme but also the most intensely discussed topic in the interviews with the subjects. Thus it became the dominant theme in the interview part of the study.

There was a general consensus among those interviewed that certain key personnel concerned with the trial stage in the criminal process lacked appropriate training (see Republic of Botswana 1971(a), Kirby 1985, Boko 2000). These officers were, in order of importance, customary court presiding officers, prosecutors, court interpreters and court clerks. In the context of the trial process these are individuals whose competences and skills, are not only vital to how a trial is conducted but may also, depending on the combination of circumstances, shape the outcome of the case albeit to varying degrees.

There was a belief, shared by all, that both magistrate and customary courts, more particularly the latter, were severely affected by the strain of having to rely, in vital areas, on untrained personnel or personnel with less than adequate training in criminal law and related subjects to drive the trial process. This was regarded as having a damaging effect on the criminal justice system as a whole. The prevailing state affairs was considered by all as both unsatisfactory and a source of concern. In other words there was a general acknowledgement and concern that practices of the courts fell short of normative standards in certain important respects and in certain important areas because of lack of properly trained staff (see Bouman 1984).

Training was therefore regarded as both an urgently required short term measure and a long term solution. However, most thought that it was important to re-train staff currently in post to arrest the problem and improve performance. It perhaps underscores the severity of the problem from the perspective of the interviewees that they regarded training first and foremost, as a remedial measure.

For most key personnel, with the possible exception of court clerks and court interpreters, some exposure to criminal law was considered by all those interviewed to be essential.

(1) Presiding Officers

(a) Magistrates

Of all the cadres of court staff who were the focus of this segment of the study, magistrates were the only group which were not the subject of any complaints. None of the court personnel interviewed had any complaints about the skills levels, competences, training, or performance of magistrates. This is not surprising as the magistracy is made up of professionally trained lawyers. The magistrates interviewed in this study were no exception. The impression I got from a survey of both opinion and fact, was that only magistrates received adequate relevant training for their role in criminal trials, and ironically, they were also the only group that attended workshops and seminars on a regular basis as part of on-going training.

(b) Customary court Presidents

Customary court judges were universally identified as the weakest link as far as the delivery of justice in the lower courts was concerned. Not only did the interviewees believe that customary court judges had lower general and technical skills than other key court personnel but they also thought that the implications of this for justice were far more serious than would be

the case in respect of other court staff. They observed that since customary courts were manned entirely by laypersons, the scope for error was much larger there than in magistrate courts where the presiding officers were professional lawyers, a view confirmed by a number of writers (Kirby 1985, WLSA 1999, Boko 2000). Thus, there was a perception amongst respondents, that whatever shortcomings there might be among other key personnel, they were more tolerable than those of presiding officers. This may explain why most of the interviewees were more anxious that customary court judges should receive training as a matter of urgency.

The three customary court judges interviewed in this study agreed that the technical competences of presiding officers were generally low. The interviewees blamed inadequate training in criminal law and adjudication-related functions for the problem. They were convinced that lack of proper training or adequate training was a major handicap for customary court presidents, and that, it almost certainly affects the way cases are conducted in those courts. All the three judges felt that existing induction courses were too short and that refresher courses and workshops were either non-existent or too irregular. It appeared that the subjects had, through their personal experiences as Presiding Officers, come to the conclusion that criminal trials are complex affairs that require a high level of technical skills and competences which the existing training programme could not deliver.

The Assistant Customary Courts Commissioner and the Member of the Customary Court of Appeal confirmed the views of court clerks, prosecutors and customary court judges themselves regarding the technical abilities of the latter. According to the two officers, the most common problems they came across when reviewing cases from customary courts included some basic problems namely (i) evidence and procedure: according to them procedures laid down in the Customary Court Act were often not followed

by judges, (ii) Elements of a fair trial were not observed (Kirby 1985, Boko 2000), (iii) failure to spot errors in the indictment. A common example given was that sometimes the judges would fail to spot that the charge sheet did not disclose the offence charged as required by rule 15 of the Customary Courts (Procedure) Rules, (iv) jurisdiction: presiding officers sometimes exceeded their jurisdiction.

As much as the interviewees agreed on the necessity and desirability of training customary court presiding officers, the underlying reasons for, as well as the nature and extent of the training envisaged, varied somewhat. Most notably, presiding officers themselves put primary emphasis on the acquisition of certain task-related skills and competences while others thought training of a professional or semi-professional nature was essential. While the presiding officers identified the problem as purely technical, other interviewees believed it was deeper than that since in many cases it involved the lack of literacy skills.

Thus, according to the other interviewees, the problem of customary court judges went beyond that of inadequate training in essential legal skills in that sometimes the judges lacked general skills or basic education. General skills in this context would include those skills ordinarily acquired through education such as the ability to read and comprehend a variety of official documents rather than simple literacy. Even though lack of general skills did not necessarily apply to the three customary court judges interviewed in this study, it was generally accepted that some presiding officers in the outlying villages were either not literate or had low literacy skills. This essentially means that such officers cannot be given legal training to improve their performance.

The problem lies with rules governing the recruitment and retention of customary court judges. As a rule those appointed to serve as traditional leaders of whatever rank in tribal courts are of royal blood. Only presiding officers of urban courts are exempted from this rule. As a result of the hereditary principle, sometimes illiterate individuals are appointed to the position of presiding officer simply because according to custom they are entitled to take over at that point. It seems the question whether these individuals have the necessary general skills to execute the function of presiding officer is not considered. The other problem seems to be that traditional leaders who also serve as presiding officers do not appear to have a retirement age. These two factors would seem to have the effect of inhibiting attempts to raise skills levels of customary court judges through training.

(2) Police Prosecutors

Botswana Police (BP), the national police force, were responsible for prosecutions in cases that come before magistrate courts, a function which they performed on behalf of the Attorney General (S13 (1) CP&A). They also conducted prosecutions in customary courts. Local Police (LP), on the other hand were restricted to prosecutions in the customary courts. The Local Police force was based at the tribal court complex or urban court complex as the case may be.

All key court personnel in both courts, including prosecutors, believed the latter did not generally perform to expected standards. As in the case of customary court presiding officers, lack of training or inadequate training was identified as the source of the problem. Customary court presiding officers believed that both BP and LP prosecutors lacked the necessary depth to carry out their functions effectively but they also thought that better training could remedy the problem. Magistrates expressed similar concerns

about the performance of prosecutors from Botswana Police. But the remedy proposed by the magistrates was far more radical than that suggested by customary court judges. Magistrates wanted the police prosecutors to be withdrawn from magistrate courts and to be replaced by trained officers seconded from the Attorney General's Chambers. They believed that the police were either reluctant to hire qualified lawyers to handle prosecutions or were simply not prepared to train police prosecutors up to a professional level. Magistrates were particularly concerned about the imbalance that tended to occur in defended cases as untrained or poorly trained police prosecutors had to engage trained lawyers.

Both the Local Police and Botswana Police prosecutors interviewed believed that the police prosecutors did not receive adequate training. The BP officer had undergone training in prosecution at the police college but he felt it was not enough especially that it did not equip the police to square up to defence lawyers. The LP officer had a certificate in law from the University of Botswana, an evidently rare occurrence in the LP. According to his supervisor he was only one of two LP officers in the whole district who had held such a qualification, and even so, the district was regarded with envy by other districts.

Even though the two police officers agreed with the other key personnel that training received by the police in prosecution was a major constraint as far as the performance of prosecutors in court was concerned, they believed there were other compounding factors. They suggested that development of highly skilled police prosecutors was inhibited by the multiple functions these prosecutors had to perform as officers and also by a lack of a dedicated prosecution unit within the two forces.

(3) Court Clerks

Unless otherwise stated, in this section the term court clerk refers to customary court clerks. Court clerks based in magistrate courts were not directly involved in criminal trial, except occasionally as substitutes for interpreters. Their functions are primarily administrative, revolving mostly around filing (see Order III Magistrate Courts Act). Unlike customary court judges, magistrates took notes for themselves during the trial.

Training of court clerks was considered important not simply because it was necessary for them as officers of the court to have some kind of training, but rather because low levels of general and technical skills amongst presiding officers made it imperative for the former to have some understanding of procedure and substantive law. There was an expectation among chiefs, prosecutors and court clerks that the latter should as a matter of course guide chiefs if they should require assistance regarding procedure or some aspect of substantive law during the course of a trial. As one clerk put it: *'As the Court Clerk I am expected to advise the presiding officer whenever he makes mistakes regarding the applicable rule in court case and so on.'* So it seems court clerks were cast in the difficult role of unofficial advisors to chiefs on how to conduct cases and were also expected to make up for the lack of skills in the latter. However, this became not merely an expectation but an imperative where the presiding officer happened to be illiterate or semi-literate as was reported to be the case in the outlying villages and smaller settlements. Given that the court clerks were not trained in law, if they found themselves working alongside an unskilled, inexperienced and/or illiterate presiding officer, this could easily result in recurrence of errors. As observed earlier customary courts have a reputation for committing errors during trial (Baillie 1969, Kirby 1985, Boko 2000).

(4) Court Interpreters

Like court clerks, prosecutors and customary court judges, court interpreters were adjudged to be performing below expected levels of competence as a result of lack of training. The role of a court interpreter is to translate what is being said in court from English into Setswana and vice-versa for the benefit of the accused person, witnesses or the court. Currently of the two types of courts, only magistrate courts use interpreters largely because the language of these courts is English (S5MCA). Court clerks step into the role of interpreters when the latter are not available for whatever reason. There was no indication that after being recruited from the ranks of secondary school graduates, court interpreters underwent any training at all . Magistrates complained that court interpreters had particular difficulty translating Setswana to English. According to the magistrates, this could potentially lead to a miscarriage of justice, especially where the presiding officer was a foreigner, as was often the case.

Withdrawals, Reconciliation and Compensation

Presiding officers of both courts were asked questions pertaining to these issues as literature suggested that they might be philosophical or value-based differences around these issues (Comaroff and Roberts 1981). The magistrates said withdrawal was the prerogative of the prosecution. According to them withdrawals normally occurred if there was insufficient evidence to proceed with the case or when witnesses or the accused persons absconded or where defence insisted that the case be finalized. In contrast, customary court judges said withdrawals usually happened whenever the complainant and the accused person(s) decided to reconcile or not to proceed with the case any longer. As far as reconciliation was concerned customary court judges were more proactive than magistrates who said it was mostly the prosecution that took the initiative to reconcile the disputing parties, usually at the instigation of the complainant.

Customary court judges said where appropriate they engaged disputing parties before, during or after the conclusion of the case but magistrates did not report doing the same. A similar situation obtained with respect to compensation. Whereas customary court judges said they made compensation awards as a matter of course where they deemed them appropriate, magistrates said they awarded it only upon application by the victim (see *State v Mothobi (Practice Note)1985 BLR19*) and even then in clear cut cases, otherwise they preferred that compensation be pursued in the civil courts. Differences between courts in relation to reconciliation, withdrawals and compensation were evidently reinforced by rules governing the trial process in either court.

Community Values and Criminal Law

Presiding officers were asked to say what they considered should be the guiding principle for judges in cases where there was an apparent conflict between the moral values of the local community and criminal law. While agreeing that criminal law did not always accommodate the values of local communities, magistrates maintained, that they were bound to operate within the four corners of the law and that any flexibility on the part of the court in a given instance must be within the framework of the written law. Customary court presiding officers were more ambivalent, suggesting instead that perhaps some way should be found of re-aligning customary law with received law whenever there was a clash of values or aims. In that regard customary court judges believed there were major differences between the two legal systems regarding punishment in general. They believed in particular that the existing punishment regime did not build the character of young persons as would have been the case under customary law.

Courts and Host Communities

It became apparent during interviews that judges of the two types of courts saw the relationship between the courts and the communities they served rather differently. All the customary court judges, without exception, thought their courts represented community views in ways that magistrate courts could not hope to match. Thus they saw themselves as custodians of community values. In contrast, while not claiming any great intimacy with the host communities, magistrate court judges nevertheless saw themselves as serving the 'public. It is interesting to note that while chiefs spoke of 'the community or tribe', magistrates spoke of 'the public.' In Tswana 'Community/tribe' and 'public' translate as 'morafe' and 'sechaba' respectively, which retains the subtle but important distinction as reflected in the Informal Justice Movement discourse (Abel 1982).

This seems to be a commonly held view amongst traditional leaders in relation to received courts generally, (see for instance, the House of Chiefs debate on the Stock Theft (Amendment) Bill 1997). This view is supported by some (eg Otlhogile 1993,) and celebrated by yet others (see Gulbrandsen 1996 for instance). A difference in the vocabulary employed by the presiding officers of the two types of courts possibly suggests differences in posture towards the host community. Customary courts claimed ownership by community and therefore, by implication, claimed greater legitimacy than magistrate courts. The language used by magistrates speaks to more bureaucratised notions of justice.

Both these views ring true but what remains contentious, however, is whether they reflect reality as it is on the ground or overstate it. It is not too difficult from an objective point of view to see why customary court judges would regard themselves and their courts as the 'true' representatives of their communities or tribes' values relative to magistrates

and other received courts. Let's take the chief's court as an example. The Chief's court occupies such a manifestly unique position in the life of the community that it is difficult to argue that it does not in general terms reflect the spirit and values of the community it serves.

Quite apart from the fact that the chiefs' courts were the seat of polities that predated the present nation-state, they still perform much the same juridico-administrative functions with which they have traditionally been associated. The Chiefs' court is the place where people report deaths of relatives, conduct the sale of cattle, have letters to claim insurance written or signed for them and above all, it is the place where the community meets to discuss issues affecting the village and/or the tribe as whole. The phrase 'chief's court' does not quite capture the essence of what in Setswana is called the 'Kgotla'. The former conveys a rather restrictive and incomplete meaning of the place and its symbolic value. It is for this reason that some writers prefer 'Kgotla' to court (e.g. Gulbrandsen 1996). Given the foregoing, customary court judges were probably justified to a certain extent in portraying themselves not only as repositories of community values but also as being responsible to those communities in ways peculiar only to traditional structures. It was as much a claim to unique access to the community as it was a claim to a unique location in the institutional complex serving the community whether pre-existing or state-generated. It remains a debatable point whether an idealised and monolithic notion of community values presented by the subjects does not in fact only represent dominant sections of the community. Literature tends to suggest that customary law and by implication customary values are fluid and contestable (Roberts 1972, Comaroff and Roberts 1977;1981)

This may explain why chiefs in particular believe that they bring into the administration of justice authority that attaches to traditional leaders and a

way of connecting with the local community that is different from that of magistrate courts and other state institutions. As leaders of their tribes/communities they or their representatives hold regular meetings to discuss with and consult communities about issues of concern. Crime, being a chronic social problem, is almost invariably discussed at these community meetings. The Kgotla as a community forum may, as it is entitled to do, set its own crime control agenda in collaboration with or independent of other government structures. It is not surprising therefore that chiefs regard themselves as the guarantors of social order in their communities, and are sometimes even prepared, with the backing of their tribes, to use methods, which the government may strongly disapprove of to suppress and control crime. This has been most evident in respect of youth crime.

In comparison magistrate courts do not interact with communities in the same way and their functions are largely restricted to issues of justice in the narrow sense of the term. They are not able to mobilize or tap into community sentiment in the same way as customary courts. Nor are they able to set the crime agenda outside the narrow context of the cases that come before their courts. To that extent the customary court judges were not entirely wrong to characterize magistrate courts as somewhat detached from the communities they serve.

At the same time in characterizing magistrate courts as 'government courts' the customary court judges appeared to be implying that by comparison customary courts have not really been captured by the state. But customary courts are part of the state system. Not only is the customary legal system constituted by and in terms of state-generated laws but it is also linked to the received system structurally and in terms of its operations. Furthermore, notwithstanding differences in the recruitment and training of customary court judges and magistrates, both are, in the final analysis, civil servants

(Griffiths. A 1996). This view, though still fiercely contested by Chiefs, was affirmed by the High Court in *State v Seepapitso* IV (1972) BLR43. In that case the High Court ruled that in his role as presiding officer of the customary court, the chief is no more than a public servant. So the distinctiveness customary courts does not lie, as suggested by the customary courts judges, in their being outside the state system as such, but perhaps rather more in underlying values and philosophical outlook of these institutions.

Punishment of Youthful Offenders and Women

Apart from training, the most recurrent theme in interviews with customary court judges was youth disorder, offending and punishment. They believed that the legal formalism (e.g. S20 Customary Court Act and S10(8) Constitution of Botswana) and provisions in the law relating to the handling of cases involving young persons made it difficult for them to stamp out of general social disorder. In particular they were concerned that the existing legal regime interfered with traditional Tswana approach to bringing up children because it restricted the use of thrashing as an instrument of discipline. The judges expressed similar sentiments regarding punishment of women.

Customary Courts and Higher Bodies

The three customary court judges interviewed were strongly opposed to having cases from customary courts reviewed by the Customary Courts Commissioner (CCC) and particularly the District Commissioners (DCs). They instead indicated that they preferred to have that function performed by Customary Court of Appeal or by magistrates. The common theme in the answers proffered by the subjects when pressed to explain their apparent hostility towards the CCC and DCs was that these two offices did not understand ways of the customary courts. They believed that the CCC and DCs interfered excessively with sentences passed by customary courts.

According to these customary courts POs, the efforts traditional leaders used to curb crime were often frustrated by the higher bodies as they tended always to reduce sentences passed by the trial court. The subjects regarded the Customary Court of Appeal and Magistrate Courts as good alternatives to the CCC and the DCs. It must be said that reasons for the resentment of the CCC and DCs are more deep-rooted than the explanations given by the subjects might suggest. There is a history of conflict between chiefs and administrators at the parent ministry and at district level. In the eyes of traditional leaders the CCC and DCs are reminders and manifestations of what they most dislike about their relationship with government at ministerial and local level (see Proctor 1968, Gillett1975, and Grant1980). Most of the powers that the chiefs lost before and after independence went to the various organs of the Ministry of Local Government. The latter is also the supervising Ministry for the Department of Tribal Administration whose mandate is to oversee the running of customary courts. The DCs are also answerable to the same ministry. They have overall responsibility for the administration in the districts to which they are assigned.

Having said that, some of the differences in the attitude of the POs towards the CCC and DCs as compared to the Customary Court of Appeal and Magistrate Courts could indeed be plausibly explained in terms of the perceived extent of interference in and involvement of these bodies with customary court processes. The extent of interference itself varied according to the statutory functions of these entities viz-avis customary courts. The role of the Customary Court of Appeal and magistrate courts was largely revisory (S4 and 5 CCA before 2001amendment). In contrast the CCC and the DC's role combined revisory and supervisory functions. Thus the CCC and DCs were more deeply involved in operations of customary courts in general than the Customary Court of Appeal and Magistrate Courts.

7.11 Findings

Finding 7A: Inadequate training or lack of training of key court personnel was the single most important concern among staff of both customary and magistrate courts interviewed in this study.

Finding7B: Court staff from both types of court considered that inadequate training or lack of training affected the quality of justice delivered by the lower courts. However, they believed customary courts were more likely to be adversely affected by this than magistrate courts since presiding officers in the former were more likely than those in the latter to lack general competences and the necessary professional training to effectively and correctly handle criminal cases.

Finding 7C: Customary court judges were unhappy with prohibitions against the use of corporal punishment on certain sections of the youth and females generally.

7.12 Conclusion

When considered against all other themes, training emerged as the dominant theme in this part of the study. It was considered by all to be the most critical issue confronting the courts and was adjudged to have the most severe impact in the customary courts where, according to the subjects, the most important officer of the court, the presiding officer, often either lacked training or had received inadequate training. In comparison presiding officers in the magistrate courts were fully trained professional lawyers. The general profile of key court personnel of both courts confirms some of differences in the level of training mentioned by court staff. The skills and training deficit has implications for the quality of justice rendered by these courts. By inference, the risk of wrongful conviction was higher in customary courts than in magistrate courts. On the other hand poor prosecutorial skills among the police meant that in the magistrate courts the scales tipped in favour of accused persons, especially in defended cases.

Looking at the whole spectrum of themes emerging from data analysis it was also clear that there were some differences regarding the meaning and importance of indicative themes to the two courts. As far as customary courts were concerned the dominant themes were, training and background of staff, punishment of women and young offenders ,reconciliation and withdrawals, the structural relationship between customary courts and review bodies and as well as the relationship between the courts and the host community. The following emerged as the dominant themes in magistrate courts, training and background of key personnel, reconciliation and withdrawals and the relationship between the two courts and the host community. The themes not only brought out differences in the attitude of the two types of courts regarding a variety of issues but also serve to highlight to some degree, differences in the focal concerns of the two courts suggesting in essence, that they probably consider themselves answerable to different interpretive communities in matters of justice.

CHAPTER EIGHT

8.0 SUMMARY, ANALYSIS AND GENERAL DISCUSSION

In the Chapters Five, Six and Seven we presented the results and findings of the study respectively. This chapter summarizes the major findings of the study and considers whether the primary hypothesis has been confirmed or not. But for the most part it discusses factors, both immediate and a remote, which form part of the explanation and general context of patterns of punishment in the customary and magistrate courts. The closing sections of the chapter look at other aspects of the study, including the implications of the research for Botswana and other post-colonial societies, further research and implications for policy. The Summary section highlights the most important findings in light of the thesis of the study. In other words the Summary section briefly considers to what extent when taken individually and/or together the findings confirm or disconfirm the primary hypothesis. The discussion sections do not repeat analysis already undertaken in the preceding three chapters, but incorporate only critical elements from those chapters to illuminate the discussion of various issues as they relate to the primary hypothesis. The last section discusses the wider meaning of the findings of the study in the context of research on plural legal orders.

8.1 Introduction

The purpose of this study was to examine the impact of differences in the structure of discretion of judges of magistrate and customary courts in relation to use of multiple punishments and whether the exercise of these powers was likely to lead to unjustifiable disparities in the punishment of offences. The thesis was predicated on the assumption that both the variation in discretion as to combination of punishments and the inherent value-based differences in customary and magistrate courts were likely to result in significantly different sentencing outcomes for similar offences.

The general or primary hypothesis stated: Differences in the structure of the sentencing discretion of judges of customary and magistrate courts as regards the types and combinations of punishments they may impose in respect of any offence triable in either type of court is likely to result in the imposition of unjustifiably dissimilar punishments for similar offences.

As a first step I sought to establish whether there were any general patterns as regards the distribution of offences by type of court. Second, I wanted to determine whether there were any variations in the outcome/sentencing patterns of these courts for offences triable-either-way, generally. Evidence of philosophical differences in approach to punishment could only be obtained indirectly through surrogate measures such as distribution of cases and general punishment patterns hence non-directional hypotheses H1-H2A. Finally, and most importantly, having disposed of these questions I turned to the central question: whether differences in discretion resulted in unjustified disparities. Using an assortment of quantitative techniques I compared and measured the effects of an identified variation in the discretionary powers of magistrate and customary court judges on sentencing disparities in cases involving multiple punishments. I then examined how the two courts punished offences and offenders with similar characteristics.

The major findings from that effort are recapitulated in this chapter. However, I do not rehearse all aspects of the findings in detail nor do I consider in a comprehensive way possible explanations for those findings as I have discussed those aspects extensively in the previous chapter. In this chapter I also discuss the significance of the study in light of the findings and make recommendations for further research. I only consider in detail findings that relate more directly to the primary hypothesis rather than those

pertaining to aspects of other hypotheses that served a surrogate or supporting role. Those were discussed in the preceding chapter.

8.2 Conclusion of the Study: Primary Hypothesis

This study concludes that taken as whole, findings relating to directional and non-directional hypotheses provide substantial support for, and to a great extent, confirm, the primary hypothesis of the study. Put another way, the study found that there were significant disparities in the use of multiple punishments by the two courts some of which could be attributed to differences in the discretion as to combination of punishments. Some of the differences in the deployment of multiple penalties appeared to be a function of deep-seated value differences and other factors rather than the variation in discretion as such. Customary courts tended to punish more severely than magistrate courts across all offence categories wherever they chose to deploy multiple punishments. It was difficult to find factors that might justify the magnitude of differences in the punishments imposed by the two courts for similar categories of offences.

Having said that, it must be noted that due to thinness of data, itself attributable in part to sharp differences in the use of penalties by the two types of courts, it was not possible to determine conclusively whether customary and magistrate courts would punish similarly situated offenders who have committed similar offences differently. However, the results on the whole showed that the two types of courts generally tended to punish offences differently so that the most frequently deployed/utilized punishment(s) in respect of any given offence group often differed in kind if not in terms of the most preferred penalty for that offence.

8.3 Summary of Major Findings and Conclusions

Major Finding 1 Analysis shows that there was a general relationship between variation in the discretion of courts as to combination of punishments, and the type and relative severity of the multiple punishments deployed by the two types of courts as postulated in primary hypothesis. Each of the two types of courts generally tended to use multiple punishments combinations peculiar only to itself that is, not used by the other. Only few combinations were shared. Some of the disparities arising from the use of multiple punishments can be linked to differences in discretion as to use of multiple punishments in that some of the combinations permissible under the law for customary courts would not have been permissible for magistrate courts. However, some of the combinations appeared to be more a product of the attitude of the courts rather than strictly a result of the variation in the discretion of the courts as such because theoretically it should have been possible for either court to impose some of the punishments applied by the other court but they nevertheless did not do so. Thus, in regard to the relationship between the structure of discretion and deployment of multiple punishments the primary hypothesis was substantially if only partially supported in so far as it assumed that the variations in the use of multiple punishments might be explained solely in terms of differences in the discretion of the courts.

Major Finding 2: It was found that in some cases the deployment or non-deployment of certain combinations of punishments had little or nothing to do with the availability of those combinations as a possible choice.

Major Finding 3: The study found that taking things at the broad level of similar offence types customary courts punished more severely than magistrate courts and that this was the case across all offences considered. Customary courts tended to apply multiple punishments with greater

frequency and in more varied forms than magistrate courts. In other words, not only were customary courts more likely to impose multiple punishments for assault-related offences, malicious damage to property, theft-related offences, burglary and related offences and nuisance-related offences, but they were also likely to do so more often using a wider range of combinations.

Major Finding 4: Whereas customary courts deployed quite varied combinations of punishments, those deployed by magistrate courts tended to be limited mostly to a suspended prison term plus some other punishment. Furthermore, while combinations used by magistrate courts never exceeded two punishments and those of customary courts often included up to three different punishments; in one instance combinations of punishments deployed by customary courts in relation to one particular offence were as many as sixteen while those deployed by magistrate courts for this offence group were no more than two.

Major Finding 5: While patterns varied according to offence type, divergences were evident in relation to severity and the extent to which a particular type of court was likely to use a particular type of a combination of punishments to punish any given category of offences. Even though we were not able to take this comparison to another level to establish whether the use and severity of punishment(s) awarded varied for similarly situated offenders (Hypothesis 4) because of data limitations, it was clear that punishments varied enormously for offences of a similar type. Differences in types of punishment applied generally, including in cases where multiple punishments were not deployed though it must be said in such cases differentials as measured in terms of mean scores were small. It was, therefore the use of multiple punishments which tended to increase severity differentials.

Major Finding 6: Customary courts were more likely to deploy multiple punishments with respect to triable-either-way offences than were magistrate courts.

Major Finding 7: If classification of offences as triable-either way or not was disregarded, magistrate courts were overall just as likely to deploy multiple punishments as were customary courts though as a rule they did so for higher level offences than the latter. The first part of the finding contradicts and disconfirms directional hypothesis H3.

Major finding 8: With respect to triable-either way offences, customary courts were more likely than magistrate courts to use different combinations of punishments to enhance punishment, perhaps reflecting a commitment to particular ways of punishing particular offences and/or a desire to make up for the perceived deficit in the substantive sentencing powers. In contrast magistrate courts tended to use combination punishments to avoid imposing a more serious or severe sentence such as imprisonment, for instance.

Major Finding 9: The result of the overall patterns of multiple punishments was that customary courts punished more severely than magistrate courts when deploying multiple punishments. They commanded the highest severity scores across all offence groups. Typically the highest score in customary courts for most offence categories save for nuisance-related offences was 12 or above. In contrast for magistrate courts the highest score was 10, even then for only two out of five offence categories. The largest difference between the maximum score values of the two courts in respect of any offence group was 5 points, which was registered in relation to theft-related offences. The differences in the score values suggest unwarranted differences between the courts in the punishment of similar offences.

However, without information on offender characteristics this must be regarded with some caution.

The results of the study concerning multiple punishments have implications for the current debate on comparative justice as perceived disparities in the sentences awarded by customary and received courts are at the heart of that debate. The question is not whether there should be any similarities/differences in the way customary and received courts punish offenders as the system was deliberately designed to accommodate both. Rather the question is one of degree. In other words it is the magnitude of difference that matters, both from the standpoint of principled sentencing, and public perception. The findings of this study suggest a relationship between the kind of multiple punishments the courts deployed and differences in the structure of discretion allowed by the courts in relation to the kinds of punishment combinations they may deploy. In terms of the current arrangements customary courts have wider powers than general courts in terms of the combinations of punishments they may impose for any given offence. This was clearly borne out by a variety and range of multiple punishments that the former imposed for the same offence group.

8.4 Summary

The results of the study show that the major hypothesis concerning the effects of variation in discretion of judges as to punishments they may impose is substantially supported as indicated by MF1-MF9. It will be recalled that the primary hypothesis of the study was that: Differences in the structure of the sentencing discretion of judges of customary and magistrate courts as regards the types and combinations of punishments they may impose in respect of any offence triable in either type of court is likely to

result in the imposition of unjustifiably dissimilar punishments for similar offences.

This study has shown that the relatively unstructured discretion of customary courts regarding choice as to combination of punishments tended to result in those courts punishing convicted offenders for triable-either-way offences more severely than magistrate courts did (Findings 5C2 , MF5 and MF6) as postulated under the primary hypothesis and supporting hypothesis H3 and H4.

For any given triable-either-way offence, customary courts invariably imposed multiple punishments in a greater proportion of cases than magistrate courts (MF2). Customary courts also tended to use multiple penalties more than magistrate courts did in relation to triable-either-way offences (MF6). However, it must be remembered that general undifferentiated offence data from the census survey presented an entirely different picture from that suggested by supplementary data from Mochudi as far as the use of multiple punishments by the two courts was concerned. It showed that magistrate courts were just as likely to impose multiple punishments as were customary courts (MF7). There are two plausible explanations for this seeming contradiction between the general data and the supplementary data regarding the use of multiple punishments by magistrate and customary courts. Since general census data for magistrate courts did not discriminate between triable-either-way and non-triable-either way offences while that of customary courts did not include these for reasons of jurisdiction, it may have caused the apparent use of multiple penalties by the former to appear to be on par with that of the latter. The probability that this was indeed the case is high since non-triable-either-way offences were generally of a more serious nature than triable-either-way offences hence more likely to attract multiple penalties thus pushing up the apparent use of

such penalties in magistrate courts to a level comparable with that of customary courts, generally. Another possible explanation is that perhaps Mochudi supplementary data on its own is too small to use to draw wider conclusions about the use of multiple punishments since it covered only a limited number (albeit most common) of triable-either-way offence groups and over a span of four years only. However, the results from supplementary study still carry a great deal of weight on their own because coverage of selected offences for that period was 100%.

The results of the study also showed that cases tried before customary courts were subject to a wider and more varied range of multiple punishments than those coming before magistrates (MF3). In addition, cases with the highest severity scores across all offence groups were invariably from customary courts (5C2). This was the case despite the fact that for any given offence group customary courts handled offences in the lower band of that group while magistrate courts generally handled moderately serious to serious offences within same offence group (5A2).

It was evident that the two types of courts generally used multiple punishments for different purposes (MF8). In the case of customary courts it appeared that multiple punishments were used mostly to enhance punishment whereas in magistrate courts they appeared to be used mostly to avoid the imposition of a more severe penalty, especially long prison terms (MF8).

Even though differences in the way customary and magistrate courts deployed multiple punishments appeared to be related substantially to variation in the discretion as to choice of punishments, some differences in the use of or non-use of some combination punishments seemed to be unrelated to non-availability of choices in relation to the particular type of

court as regards those punishments (MF2). As a result, we found that even in cases where particular combinations of punishments could have been deployed, they were not. Yet, as it happened the other type of court would often choose that very combination. So there was a divergence in the patterns of use of some punishments combinations even where there need not have been any given similarities in availability of choice with respect to choice of combinations. To that extent, it seemed that other factors other than variation in the structure of discretion were at play. These factors probably included value-related reasons or orientation. It will be recalled that the main underlying assumption of this study was that value-related differences would tend to express themselves where the rules allow one or both types of court greater discretion to punish offences as they wish (see Chapter One and Chapter Four generally). Thus these divergences were consistent with the basic assumption of the study to the extent that they generally followed patterns that would be expected in relation to the two types of courts.

But the picture was in fact much more complex than might have been predicted. It was evident that multiple punishments imposed by customary courts in respect of particular offences did not necessarily follow the customary pattern as far as the mix and use of different penalties was concerned. At the same time the new mix of multiple penalties deployed by customary courts built on the traditional patterns in that they tended to include what would have been the preferred penalty for particular offences under customary law.

The results of this study show that not only does availability of new punishments to customary courts increase the hybridization of punishment but it also involves to a large extent the superimposition of new punishments on traditional ones. Traditional uses were also more evident in those cases where non-multiple or single punishments were deployed. It is clear that

where the law gave customary courts flexibility they used traditional penalties to punish even though, generally, relative to multiple punishments single punishments constituted a minority of cases. Overall, uses of different penalties by the customary courts were consistent traditional patterns though changing.

Thus even as punishments have changed they have remained the same on some level in that where multiple punishments have been awarded the traditional punishment may more often than not be used in combination with others. As a result we see both the persistence of customary ways of dealing with certain wrongs and the perverse effects of incorporating new punishments into the traditional menu: harsher punishment.

It is also interesting that given the overall picture that is emerging regarding the use of multiple punishments, as far as the use of each of the different penalties/punishments on their own or singly was concerned, magistrate courts were significantly more likely (p value < 0.001) than customary courts to use the most severe of penalties, namely imprisonment. At the same time, magistrate courts were significantly less likely to award the strokes (p value < 0.001) and fine (p value < 0.001) compared to customary courts.

The paradox regarding the results of the study was that despite customary courts being comparatively more punitive when deploying multiple punishments, customary court judges were apparently more likely than magistrates to mediate between and attempt to reconcile disputing parties at any stage in the dispute process. This appears to confirm the view that it is fundamentally part of the ethos of customary courts to want to reconcile disputing parties (Griffiths. A 1983, Comaroff and Roberts 1981, Schapera 1938). Furthermore, customary court judges made a greater effort to look behind the offence to get to the 'real' issue or to pursue substantive justice.

8.5 Explaining Differences between the way Customary and Magistrate Courts Used Multiple Punishments

8.5.1 Differences in the structure of Discretion

Choice as to punishment

Differences in the structuring of discretion as to punishment explain to a large extent patterns indicating greater propensity of customary courts to deploy multiple punishments in respect of triable-either-way offences than magistrate courts and resultant harsher punishment of similar offences (see Figure 1 and Appendix C). This is consistent with sentencing research evaluations and reviews which have shown that unstructured discretion tends to result in greater inconsistency and disparities than in situations where discretion is structured (Spohn 2002, Ashworth 1992(a&b), Tonry 1988;1996). Given the flexibility allowed customary courts in relation to the punishment menu, a great deal of inconsistency could be expected from customary courts and was indeed shown by range of punishments deployed (see Findings 5C3 and MF3) and in general terms. The extent and range of multiple punishments that customary courts in this study imposed for triable-either way offences means that it would be difficult to predict the sort of punishment that a person is likely to suffer for committing an assault, for instance. In comparison the patterns in the magistrate courts were not too difficult to predict in cases involving multiple punishments. In magistrate courts the dominant multiple punishment was the imprisonment /suspended prison term combination. However, it was also clear that differences in discretion as to choice of punishment could not account for all the differences in the patterns of punishment of the courts because magistrate courts often did not deploy even allowable punishments combinations in the same way as the customary courts.

Conversely, customary courts used their sentencing powers rather differently from magistrate courts. For instance, even though their powers to

substitute or add corporal punishment to punishment awarded in respect of young males under the age of 18 years were similar to those of the latter, the patterns of punishment still differed. It would appear that customary courts made substitutions or additions without any regard to the seriousness of the offence(s) concerned, resulting in unpredictable punishment. Nor it seemed was equivalence (Tonry 2004, Marinos 2005) between corporal punishment and the punishment it was supposed to replace considered in the case of customary courts. This approach to substitution and enhancement of punishment probably contributed to the inconsistencies in the punishment of offences evident in the customary court.

Thus, it was not just the breadth of choice that was significant but also the nature of substitution or additions. While substitutions could just as likely be used to reduce as to enhance punishments, it was evident from the patterns in the study that customary courts were more likely to make additions than substitutions. Moreover, where they might be expected to a make substitution such as the replacement of imprisonment with strokes, they seemed to prefer to award the strokes together with some other punishment including a suspended prison term. Magistrate courts generally did exactly the opposite (MF8).

Internal and External Relativities

Amongst the possible reasons why customary courts punishments were harsher than those awarded by magistrate courts was that the presiding officers of the two courts appeared to have different starting and end points as far as the internal relativities regarding scaling of offences were concerned. The substantive jurisdiction of customary courts in relation to ordinary criminal offences is limited to what the general courts would regard as low to moderately serious offences (see Appendix B). However, for the customary courts these 'moderate' offences are 'serious' offences

since, if we exclude the two offences for which customary courts have been granted extraordinary jurisdiction, namely stock-theft and drug-related offences, 'moderate' offences sit at the top of the most serious offences that come before these courts. It is, therefore, not surprising that customary courts tended to punish such offences more severely than the general courts.

On the other hand, customary courts may well believe that they do not have sufficient substantive powers to punish offenders as severely as they would like using any particular penalty they would prefer (see appendix B). As suggested in the preceding section, customary courts judges were unhappy with restrictions pertaining to punishment of females and young persons. So they could be making up for that by deploying a larger combination of multiple punishments with the result that for most offence categories they scored higher on severity than magistrate courts even though they generally tried the lower band of offences within those general offence categories than magistrate courts (see finding 5A2). However, when the issue of multiple punishments is considered in the context of choice as to discretion and the comparative substantive powers of the courts with regard to all punishments, then it is easy to see why customary courts would use multiple punishments to enhance punishment while magistrate courts use them as a means to avoid imposing more severe sentences. The fact that imprisonment is the basic punishment for all offences despite being the most severe penalty may also explain why we get these divergent results.

8.5.2 Discretion and Underlying Value-Indicative Factors

The relatively unstructured discretion of customary court judges probably allowed secondary factors associated with social change as it affects the customary system, together with the inherent tendencies of customary courts to come into play. Among the possible factors explaining the propensity of

customary courts to deploy multiple penalties is that it's the product of the combined effect of the hybridization of punishments in customary courts resulting from changes in the law, and the retention of traditional elements of the customary process which allows these courts to impose civil and penal sanction all at once (Schapera 1938, Bouman 1984; Nsereko1989). Other researchers on the Botswana legal system have pointed to changes in both the patterns of cases dealt with by customary court over time (Roberts 1972, Love and Love 1996; Kuper 1969) and the growing use of penal sanctions by customary courts (Bouman 1984). The resulting harsh penalties may, in some cases be simply a result of these factors rather than a deliberate attempt by customary courts to be punitive. However, as we argue below, the possibility that in some cases harsh punishment was what was probably intended cannot be excluded. Wide discretion simply provided greater scope for that eventuality. For instance in terms of finding MF8 customary courts appeared to be generally deploying multiple punishments to enhance penalties probably as way of addressing the deficits in their substantive powers (see Appendix B) while magistrate courts generally deployed multiple punishments (at least in respect of triable-either-way offences) to avoid imposing harsher punishment.

Discretion as to choice of punishment only partially explains the differences in the way customary and magistrate courts deployed of multiple punishments. There were still differences in the way the two types of punished offences in that magistrate courts appeared to be more circumspect than customary courts in their use of multiple penalties within the scope of permissible substitutions and/or additions. Differences at a deeper level regarding the attitude to and meaning of punishment as well as the significance of certain offences/offenders for the two types of court probably interacted with one another and a range of other variables to produce differences in severity of punishments awarded by these courts that are

manifest in the results of the present study. We consider some these factors in the sections below:

Even though there was no systematic way of measuring directly the impact of beliefs and postures adopted by the courts towards certain offences and offenders on sentencing outcomes, there was a lot of indirect evidence pointing to the possible influence of focal concerns on the behaviour of customary courts, in relation to sentencing. Interview data (Chapter Seven) indicates and statistical patterns on the distribution of triable-either way offences(Chapter Five) would seem to confirm that customary courts wanted and succeeded in getting certain offences (social disorder offences) that were of special interest to those courts to be funnelled to them (see Finding 5A2). It is therefore not surprising that these being offences they would like to suppress, customary courts consequently tended to punish them more severely than might otherwise have been reasonably expected. Social disorder offences were of such a nature as to be seen to challenge the authority of traditional leaders as leaders of their communities (Schapera 1970). A notable feature of these offences was that they involved young persons whom the customary courts were eager to deal with in the customary way through lashing (Tagart 1931, Schapera 1938, Leslie 1969). The demographic situation in the country, the rapid pace of social change and the high rate of unemployment amongst the youth make a clash between the youth and traditional authorities almost inevitable. These factors, together with many others, have probably helped to undermine the ability of in-formal control mechanisms to curb social disorder so that traditional authorities have to deal directly with it more and more.

Legal Formalism

Changes in the law, especially the introduction of the written law requirement (S10 (8) Constitution of Botswana and S20 Customary Court Act), appears to have pushed customary courts in the direction of penal sanctions and an inclination to accept what under customary law would be regarded as premature formalization of disputes *(see State v Bogatsu and others)*. Legal formalism has also reduced considerably the flexibility of these courts in many areas of the trial/dispute process (Bouman 1984, Roberts 1972).

(a) Specific Effects of Legal formalism

The relative inflexibility of the dispute process consequent upon the changes introduced in the law since 1972, including certain restrictions regarding sanctions applicable to female and young persons (see Finding 7C) appear to have upset traditional leaders even as they have been happy to accept other aspects of the changes. It is not inconceivable that finding certain options regarding punishment of females and young persons closed to them, traditional leaders may be making up for that by imposing multiple punishments involving as many of the available options as possible. While there was no direct evidence to support this supposition, the study found evidence that traditional leaders were unhappy about restrictions on punishments applicable to certain groups and that cases involving young persons were being shunted to customary courts on their request.

One of the positive aspects of codification is that it has introduced an element of certainty and consistency in the application of the law, including in general terms the type and/or quantum of punishments that could be awarded. However, for customary courts certainty has come at a cost. Codified law has compromised flexibility which is regarded as a premium value under customary law (Bennet and Vermeulen 1980, Comaroff and Roberts1981). Loss of flexibility, and by extension, loss of ability to negotiate

elements of the dispute or the dispute process may, in some instances, result in customary courts awarding harsher penalties than would otherwise have been the case under customary law. For instance, a legal wrong such as obscene abuse which would have been classified as delicts under customary law have not only been re-classified as criminal offences but they also attract serious penalties, including imprisonment.

Thus some penalties, have perhaps unintentionally, been rendered more severe by the introduction of codified law. For instance under customary law fines were not stringently enforced (Schapera 1942:39, Van Niekerk 1966:39-40, Baillie 1969) but after codification, default on payment of a fine became imprisonable. Moreover, the prison terms would seem to be disproportionate to the fines. Currently, under the Customary Court Act, failure to pay a fine of P10 (based on current exchange rate of $1 to 7 Botswana Pula which roughly translates to $1.40 cents) will result in 1 month imprisonment.

However, it should not be assumed on the basis of the foregoing that all the changes brought about by codification and universalization of the criminal law have only served to make customary court sanctions harsher. There are a number of instances, admittedly few, where penalties introduced under codified law for certain offences are less harsh than they would have been under customary law. For instance under customary law cattle theft attracted very heavy penalties and the owner reserved the right, amongst other things, to kill the thief if he caught the thief in the act (Schapera 1938:48). Killing a cattle thief is no longer permissible.

(b) General Effects of Legal Formalism

More widely, legal formalism has affected the ability of informal mechanisms to work in concert with formal structures such as the chief's court to control and punish misconduct in informal ways as was the practice under

customary law (Schapera 1938, Comaroff and Roberts 1981). Customary courts now find that they are constrained by the demarcation between formal and non-formal processes that the law insists must be observed (see for example S20 Customary Court Act). Even though some of these boundaries existed previously between different levels of dispute resolution mechanisms, they were much more fluid (Comaroff and Roberts 1981). Different mechanisms of social control whose function was to deal with social disorder in its various manifestations had some control over these processes so that they could decide when particular conduct warranted the attention of higher level structures. The latter function has been appropriated by organs of the new nation state such as the police.

In the traditional Tswana set up there was a structural overlap and continuity between the relatively formal senior courts and various less formal mechanisms of social control (Schapera 1938 Comaroff and Roberts 1981, Roberts 1972; 1974). The latter encompassed a wide range of mechanisms of varying degrees of formality and levels of organization including descent group or family courts, women's courts, ward courts and regimental courts. The most informal of these processes consisted in bilateral attempts at dispute resolution (Fombad 2004:174). Informal mechanisms, such the family and ad hoc regimental courts, not only exercised control over individual members but also processed wrong-doers, and where necessary, channelled them through to the higher structures (see Schapera 1938, Comaroff and Roberts 1981). Thus structures of varying degrees of formality and formal courts complemented and reinforced each other's roles as factors of social cohesion (Roberts 1971(b); Malila 1993:49). The requirement of legal formalism have disrupted this arrangement and caused the boundaries between simple misconduct and criminal conduct to harden.

Still, the present study found that the settlement oriented nature of the Tswana dispute process has not been entirely erased. For example, in many instances where cases were withdrawn to allow elders to mediate, there were often strong hints in the language and normative referents used in the discourse which appeared to suggest that the courts and the disputants often believed that they were resolving matters according to the Setswana 'way' when they engaged each other and the courts in that fashion. But it remains the case that under the prevailing arrangements this process is marginal rather than central to the dispute resolution process. Those litigants concerned more with social relationships than the formalities of trial probably find that it is more difficult than before to obtain the result(s) they want from the customary courts though they are far better than magistrate courts in that regard.

Observational data on reconciliation and other dispute processes as exemplified by the case of *Bogatsu and others* suggests that between the two systems, the customary system is generally more accommodating of the needs the relational litigant while the received system is better suited to those of the rule-oriented litigant. General literature confirms that on the whole the Tswana customary system inclines towards settlement (Schapera 1938) and relational-orientation (Roberts 1972, Comaroff and Roberts 1981) while the formalized western style systems leans more towards bureaucratic or rule-oriented justice(Abel 1982, Holleman 1995, Conley and O'Bar 1990).These divergences appear to emanate from differences in philosophical outlook about disputes and disputes process(Diamond 1973, Holleman 1995, Comaroff and Roberts 1981, Roberts 1972;1974). Customary courts, like informal courts, understand that disputes do not only serve an instrumental function but an expressive function one as well (Abel 1982: 284, Marinos 2005, Diamond 1973, Roberts 1972: Comaroff and 1981)

Bogatsu's case shows that requirements of legal formalism have reduced the ability of customary courts to deal with cases in a manner they would have preferred. Legal formalism has changed the Tswana dispute process such that the nature and scope of the dispute is now subject to technical determination rather than contestation from the point the case enters the formal system. In Bogatsu's case we see an attempt by the family to frame the dispute as being about the relationships. The customary courts saw it in those terms as well but formal processes did not allow the case to be framed in that way. The complainant saw the dispute in narrow terms as assault and he found the general system was more receptive to that approach than the customary system.

Formalism has, in essence, made the customary system more rule-oriented and less flexible as evidenced by post trial attempts by presiding officers to find out from litigants what the 'real problem' might be (Roberts 1972, Comaroff and Roberts 1981). Litigants who are aware of the importance of written rules such as the complainant in the Bogatsu's case are able to exploit the rule-oriented nature of the formalized system to their advantage.
However, it was clear from the court observations that customary courts judges were keenly aware that sometimes even if the requirements of formal justice may have been satisfied in any given instance, the real problem may have been misdiagnosed hence the often heard exhortation to disputants after the official dispute process is closed: "Now tell me what the real problem is" (*A ko lo mpolele go re lwa re mathata tota ke eng).* Where the real issue was the personal relationship between the parties rather the official charge on court papers, formal justice may leave the disputing parties dissatisfied with the trial process if that aspect is not addressed (Conley and O'Bar1990).

Other researchers, especially those working in the area of family law in Botswana have shown that litigants use the 'shadow of the law' to re-negotiate relationships (Griffiths. A 1997, Molokomme 1991, WLSA 1999) but the system has probably become more rigid especially in the area of criminal law, than earlier researchers found it to be (Roberts 1972, Schapera 1938) in regard to the formulation of disputes. Still, observations from the present study suggest that even despite these rigidities customary courts were more likely to be used to resolve personal differences. Unlike customary courts presidents, magistrates seemed to be more concerned about formal justice than they were about satisfying the users of the system. Furthermore, by comparison, they directed much less effort and energy towards repairing social relationships than their counterparts in the customary courts. It may be inferred from that that they were generally less concerned about the personal relations between the parties than were customary court judges.

This is perhaps attributable on some level to differences in the seriousness of cases coming before these two courts as well as differences in the degree of procedural formality/informality between them.

In one unregistered case I observed at Mochudi involving an alleged assault and theft that was brought before the court for mediation, the presiding officers was able to determine very quickly that the two parties were related by marriage: one was married to the sister of the other. When asked to explain what the ' real problem' was, they told the court that the dispute was really about a marriage that was breaking down and the alleged ill-treatment of the woman who was married to one of the parties and who was a sister to the other party. The presiding officer suggested a meeting between the families of the two parties to resolve the issue and the disputants agreed to explore that avenue for the time being. Litigants who use the courts as way of restoring the balance in a relationship want

official authority on their side, but at the same time want to retain control of the dispute to ensure that it does not escalate beyond a certain point. But at the same time, formalization means that they must cede control which may in its turn, bring about the result they do not want (Conley and O'Bar 1990).

In the current set up, informal mechanisms and the formal courts have lost some of the freedom of action that they used to have under customary law. Officially recognized customary courts may not punish anyone unless a trial has been held in accordance with prescribed procedures (S20 Customary Courts Act). In other words, they cannot purport to punish anyone, (including young persons over whom they appear generally to be anxious to exercise control) outside the formal processes as they would have done under customary law.

Nevertheless, Customary Court Act (S3) contemplates the possibility of bodies other than formal courts conducting 'informal proceedings of an arbitral nature.' What is interesting is that such bodies as are contemplated under the Act would be bodies 'constituted under customary law.' Thus, while courts of arbitration certainly fall within such a bracket, the term 'body' is sufficiently wide to cover a range of other informal bodies. To that extent, it is reasonable to assume that the law allows informal bodies space employ traditional modes of dispute resolution outside the boundaries of officially recognized courts. However, the powers of any such a body are limited in that it cannot purport to enforce its decisions or compel attendance before it.

There is nothing in the Act to suggest that decisions taken by such a body may not include the decision to punish the person whose conduct is complained of if she/he 'loses' the argument. Theoretically, if the decision reached by the body is that one of the parties must suffer corporal

punishment, for example, the party concerned would have to agree to submit to such punishment. According to the law if she/he does not agree, then the body cannot compel her/him to do so. In practice, however, such bodies often try to impose their decisions on the parties, even in situations where one of the parties might not want to have a decision she/he finds unacceptable imposed on her/him. The case of *State v Bogatsu and another* clearly demonstrates that even adults may find themselves forced by their families to submit to punishment even if they disagree with the decision.

Even though traditional authorities cannot participate in informal proceedings in their judicial capacity, such matters can nevertheless be dealt with at the court compound in their presence. The High Court confirmed in the case of *Kgalaeng v Attorney Genera*l *(1988 BLR 21)* that where custom allows it, as is purportedly the case under Bakwena law, 'boys are from time to time punished at the kgotla *by* their parents for misbehaviour by infliction of lashes, but errant girls are punished at home'(own emphasis). Because legal formalism has restricted the extent to which punishment may be used as a means of curbing social order in the broad sense of the term, traditional leaders have found creative ways of dealing with the problem. Some have, like in the case of *State v Bogatsu and others,* attempted to push such matters into the private domain where the family tends to be the arbiter. Others have openly defied the state and employed traditional methods of dealing with low-level social disorder as was exemplified by a clash between a Member of Parliament for Molepolole and the Bakwena regent over the latter's decision to resort to traditional policing (use of regiments) and crime control (flogging, particularly of young persons found in the streets after dark without due process) methods in 2001 when it appeared as if the police were failing in their efforts to curb youth gang crime in Molepolole (The Mid-week Sun 15/08/2001). As is evident from the distribution of triable-either-way offences and sentiments expressed by Chiefs during interviews, it

would appear that traditional leaders have also decided to use the blunt instrument of criminal law to deal with minor social disorders. But the unfortunate result of this approach is that a lot of people who should not really have a criminal record end up acquiring one.

Hybridization

The interaction between the legal cultures of the two systems and the social context in which these processes unfold, has the potential to change the meaning of punishments that are traditionally part of the repertoire of these legal systems (Findlay 1997, Cain 2001). This is particularly so in the case of customary systems which have, in the area of criminal law, been subordinated to the received law. This would be consistent with observations made by others regarding the changing nature of punishments in customary courts which are sometimes state-initiated, sometimes not (Schapera 1938:46-50, Roberts 1972, Bouman 1984). On the other hand, in the present context, the common law system may be less affected in that it forms the basis for the basic offence and punishment framework for the whole system, flexibility clauses pertaining to punishment in the customary courts notwithstanding.

What appears to be happening at least in the case of offences that were previously regarded as civil wrongs under customary law, and therefore, generally or mostly subject to civil sanctions, is that customary courts now tend to apply a mixture of traditional sanctions and penal sanctions in those cases where they decide that multiple punishments would be the appropriate penalty. Where preference for a certain penalty in respect of certain offences has been combined with the basic, general or standard punishment prescribed in the law, namely imprisonment, the effect has been to make punishment of that particular offence harsher in comparison to previously existing approaches.

Overall the patterns of the study show that the general use by customary courts of particular penalties relative to others was different to those found by earlier researchers, though in some respects it remained fairly consistent for specific offences. However, general patterns were closer to those found by Schapera (1943) and Roberts (1972) than those found by Bouman (1984). The former found that overall the leading penalties were restitution/compensation, fine, jail and corporal in that order while the latter reported a complete reversal of that pattern. The latter's study was limited both in terms of the number of years covered and the depth of the study regarding sentencing outcomes. The present study shows that the fine has overtaken compensation as the leading disposal in customary courts. However, in A Handbook on Tswana Law and Custom (1938:48), Schapera indicated that the fine and strokes were the most common punishments in customary courts though he did not indicate which was the more common of the two. If we look at how customary courts punished nuisance-related offences which includes use of insulting language, we can see that the fine and strokes remain the predominant punishments but the picture changes somewhat when multiple punishments are considered.

What is important in the context of this thesis is that when the deployment of multiple punishments is considered, the picture changes considerably, showing both consistency and departure from traditional ways of punishing thus suggesting hybridization of punishments.

More generally, the type of hybridization associated with absorption or borrowing of different ways of doing things in the context of a dual legal order in Botswana has been observed in other areas of law (see Griffiths. A 1983; 1986; 1996; Molokomme 1991). This is not unusual in systems that attempt to integrate customary systems with the common law (Cain 2001, Findlay 1997). Griffiths. A(1983; 1986;1996; 1997) has correctly observed that both the general and the customary legal systems do not represent pure

species of their genre but rather mixed systems (after their own fashion). Moreover, as social change transforms the structure of social organization and traditional obligations and rights associated with them (Roberts 1971(b), Griffiths. A 1987, Molokomme 1991) so it is to be expected that the meaning of and social sensibilities relating to punishment will change (Garland 1990: Chapter 10). But contestation over the latter between the liberal segments of society and the more conservative elements will continue (*State v Seepapitso* IV (1972) BLR43) and the product of a compromise between them may, to a greater or lesser extent, reflect the values of both hence hybridization.

Frames of Reference of 'lay' and Professional Adjudicators

One of the possible sources of difference in the way customary and magistrate courts punished may have been differences in the philosophical disposition of customary and magistrate judges owing to their lay or professional ideologies respectively. Lay and professional adjudicators are known to rely on different frames of reference (Schutz 1970) in their decision-making (Asquith 1983), which implies in turn that the outcomes of their decisions may be different (see Diamond 1990).

In the context of the present study magistrates may be seen as possessing a professional stock of knowledge that they acquire as a necessary qualification for their position/job. Because they are drawn from the ranks of professionally trained lawyers, the magistrates would therefore be expected to make their decisions based on the professional stock of knowledge, ideology or norms (see Asquith 1983, Diamond 1990).

A lay person, (which customary court judges are in this context because they are not trained to a professional level in law) would rely on what Schutz (1970) has termed 'socially approved system of typifications and relevances' (page121). They rely in their decision-making on the general stock of

knowledge even though they would generally be expected to be more knowledgeable than an ordinary person whose contact with the courts or the law is limited. As regards customary law, a chief may or may not be well versed in customary law (Roberts 1971(b)), but the system within which s/he operates is theoretically expected to provide guidance as to the correct application of the laws, rules and principles under the customary system. But in relation to the general law, the customary court judge expresses lay/customary ideologies through the use of procedures and application of rules and other devices. Being untrained, the 'relevances' of customary court judges not only include the general stock of knowledge and typifications but they are also mediated by and intersect with a variety of variables including biographies of the individual judges in ways and to a degree that is different from that of their professional counterparts in magistrate courts (see Damaska 1986).

It has been suggested that when lay judges operate in an environment where the rules allow them scope for independent thinking and action, the idiosyncrasies of individual judges are likely to assert themselves (Damaska 1986:24). Such is arguably the case in relation to customary courts judges' choice as regards punishment and punishment combinations. This in theory makes for inconsistencies in punishments (see Ashworth1992(b), Tonry 1988).

The results of the present study would seem to confirm the view that lay and professional attitudes/ideologies are consequential for punishment (see Findings 5C1, 5C2 and 5C3). Not only did penalties awarded by customary courts show a wider array of punishments combinations than those awarded by magistrate courts but they also had a wider intra-system range in severity scores for any given offence group(MF9). The range of variation between the lowest and highest severity scores for punishments awarded for by

customary courts for any given offence was so much wider than that of magistrate courts for corresponding offences. Thus, there was much less predictability regarding punishments a customary court might award in any given instance, especially in relation to both the nature and severity of punishment an offender was likely to suffer. Inconsistency and the varied range of punishment suggest predominance of idiosyncratic tendencies in the decision-making patterns of customary court judges (Damaska 1986 Ashworth 1992(b)).

8.6 The Wider Context of Punishment

In the section immediately preceding the present one we considered how a diverse conjunction of fairly specific factors might possibly be interacting to produce divergent outcomes in the use of multiple punishments by customary and magistrate courts. However, those processes can only be properly understood within the broader context of social and historical changes that have shaped the nature of punishment in contemporary Botswana. More specifically, we are referring here to changes in the dynamic between the values relating to punishment, the social structure and state organization. It will be recalled that we discussed historical-normative factors that have shaped the legal system since the founding of Botswana as a British protectorate in 1885 in Chapter Three. The normative sketch of the legal system drawn in that part of the thesis was of a general nature and as such did not concern itself specifically with punishment. This section focuses on punishment as the main theme as a part of an attempt to provide some background to explanations of sentencing patterns proffered in the preceding section.

8.6.1 Colonial Legacy and Post-Independence Instrumentalism

Botswana's punishment regime is relatively harsh compared with those of countries in the southern African region that became democratic or attained independence recently such as Namibia and South Africa (Isaacs 2004,

Hatchard 1991;1992). It is, however, not atypical when considered in the broad context of Anglophonic Africa (Tanner 1972, Coldham 2000). A number of explanations have been put forward to explain why punishment in Africa tends to be harsh. These explanations apply with equal force to Botswana.

It has been suggested that African countries inherited generally harsh punishment regimes from the colonial period (Tanner 1972:451, Coldham 2000:220). For example Tanner (1972:451) has observed that before independence the rate of imprisonment in Africa was higher than Europe and this trend did not alter after independence. Custodial penalties have remained the dominant mode of punishment in African countries (Hatchard 1985:503). Others have observed that punishment in African countries tends be directed towards retribution and deterrence (Coldham 2000:220)

The harsh punishment regimes in African countries have been associated with attempts by these countries to cope with rapidly expanding populations (Tanner 1972:458) and more generally, rapid socio-economic change which has, according to Hatchard (1985:483), increased levels of criminality in developing countries as a whole (see Shelley 1981, Sumner 1982). Some scholars have gone further to suggest that after independence there was a recognizable tendency towards instrumentalism on the part of the state in Africa (Ghai 1991). The state generally showed disdain for the technicism of law (Ghai 1991:8, see also Ng'ong'ola 1988) thereby encouraging the use of punishment as a tool for fighting crime.

It has also been suggested that reluctance of African countries to liberalize punishment coupled with lack of organizational capability and resources to implement alternatives to custody has meant that Africa has not seen a shift in punishment regimes that has occurred in other parts of the world,

especially the developed world (see Tanner 1972, Hatchard 1985, Clodham 2000). At the same time it has also been argued that fiscal crisis might cause countries to abandon imprisonment in favour of cheaper alternatives (Tanner 1972:458). It was only as recently as 2004 that there was, in Botswana, the shift towards non-custodial options, even then as Tanner had predicted, it was prompted by overcrowding in prisons and fiscal constraints rather than a paradigm shift. The punitive aspect was maintained because the alternatives to custody were enhanced considerably in order to avoid them from being seen as soft options.

Like other African countries, Botswana has since independence, been reinforcing what was already a harsh punishment regime by passing ever harsher legislation (see Ramokhua 1985, Malila 1993, Nsereko 1999). By the end of 1990s Botswana had at least nine separate mandatory minimum pieces of legislation on the statute books, most of which were enacted within a very short span (Nsereko 1999). We have observed that the punishment regime in Botswana has traditionally tended to use imprisonment as the standard punishment for almost all offences, even those offences of the most a trivial nature. Moreover, the public regards prisons as 'recreational centres' (Botswana Daily News 14/05/08) which may well encourage the courts to combine imprisonment with other punishments. The refrain that prisons are too comfortable is not peculiar to Botswana or Africa for that matter (see e.g Sparks et al 1996). While it may be true that in Africa unlike in the developed world the deprivations of those outside prison sometimes exceed those of inmates even in relatively affluent countries like Botswana, overall conditions in African prisons remain very harsh(Coldham 2000:235).

Instrumentalism appears to be influencing the government's attitude to the criminal justice system as a whole. Even the introduction of the penal code in 1964 was tainted by instrumentalism in that the process had to be rushed so

that the code could be used to deal with rioters in Francistown, a town in the northern part of the country (Republic of Botswana2002). The customary legal system has perhaps been a more pliable instrument in the hands of the government in its fight against crime than the general legal system. For instance customary courts have been given extra-ordinary jurisdiction in order to allow them to try stock-theft and dagga (marijuana) cases in an effort to curb growing incidence of these crimes. The inclination to use customary courts as instruments of crime control is encouraged by weak protections for defendants in customary procedure rules and the well known disdain of customary courts for technicism (Kirby 1985). On a more general level customary courts have been encouraged by both politicians and the wider public to use corporal punishment generally as an instrument for curbing social disorder and deviancy (see Frimpong 2000:224-229).

Yet despite the general shift towards an ever more punitive punishment regime, there has been some movement in the other direction in some areas in Botswana. For instance, while the higher courts in Botswana would not go as far as other higher courts in the region have done to declare certain punishments such as corporal punishment and capital punishment inherently inhuman and degrading; they have enjoined the government to consider reviewing the use of such punishments (see e.g *Clover Petrus*). similarly the Children's Act was may be seen as an attempt to shift the focus away from punitive measures in cases involving children and juveniles towards reform of character (see S28 of Children's Act, *Molaudi and other v State,* Maripe 2001). The higher courts have tried to ameliorate the harshness of some of the mandatory minimum sentences where compelling reasons for doing so are believed to exist by allowing down-ward departures in appropriate cases (*Moatshe*). The pressure to allow downward departures in cases involving mandatory minimum penalties *(Moatshe),* has also received legislative endorsement (see Penal Code (Amendment) Act 2004).

However, many of these developments would be expected to have little effect on the normative practices of customary courts. As a general rule customary courts are not well attuned to changes in the principles and practices of the general courts. I have suggested in Chapter Four that while some of the revisory and appeal mechanisms may be generally instrumentally effective as corrective mechanisms, they have little impact on a broader systemic level in the customary court system. We noted in Chapter Four that judges in Botswana enjoy wide discretion and that generally the appeal review system is more suited to dealing with extreme cases than ordinary inconsistencies. In the case of the customary system effectiveness of appeal reviews is blunted by a variety of factors, including low skills levels of key customary court personnel, lack of a framework in the customary legal system for ensuring that learning of rules and principles relating to sentencing is done in a systematic fashion, and lack of a mechanism for ensuring the transmission and assimilation of jurisprudence from the higher courts. Limited guidance provided by the Customary Courts Commissioner's office through memoranda would be unlikely to have been enough to produce a lasting change in the sentencing practices of customary courts.

8.6.2 Socio-Economic Transformation and its Significance

Botswana has by most accounts undergone tremendous structural transformation since independence in 1966 (Harvey and Lewis 1990, Hope 1996). When Botswana became independent from Britain, she was regarded as one of the poorest countries in the world. For much of the colonial period the country was neglected because it was seen as little more than a labour reserve for South Africa (Parsons 1984). An estimated 40% of the male population aged 20-40 were working in South Africa at independence (NDP8:7).

Despite a poor start, Botswana has enjoyed steady but sometimes-rapid economic growth for about three decades. Earnings from diamonds accounted for much of the growth having outstripped beef as the country's major export in the 1970s. However, increasing diversification has seen the contribution of the mineral sector to the GDP shrink from 50% in the mid 1980s to 34% in 1995/95 (NDP8). Unlike other mineral-exporting countries elsewhere in sub-Saharan Africa, the country has ensured that steady economic growth is maintained through good macro-economic policies (Harvey and Lewis 1990, Hope 1996), sustainable human development (UNDP 1990) and good governance (Harvey and Lewis 1990). But the country is susceptible to periodic droughts and over the years they have had a devastating effect on the rural economy. They have made arable agriculture a rather unrewarding activity. Consequently the arable sub-sector has shrunk considerably in size since independence. Cattle farmers generally have suffered massive losses as a result of recurrent drought, but farmers with small herds usually suffer far heavier losses than big farmers because, unlike the latter, they do not own boreholes. This tends to exacerbate existing income inequalities among rural households particularly during the prolonged droughts such as those Botswana experienced in the 1980s. For poor households loss of cattle can adversely affect returns from arable farming because they rely rather heavily on their animals for ploughing purposes.

Rapid economic growth has had a dramatic impact on the lives of Batswana. Massive injection of resources by government into the development of social and physical infrastructure has put Botswana at the top of the league table in Africa in terms of access to social services for citizens (UNDP 1990). Flowing from this has been the enormous expansion of job and income earning opportunities in the cash economy, particularly for the educated. An expanding economy has provided unprecedented opportunities for social

mobility for many Batswana. It has also produced rural-urban migration on a scale not seen before in the country's history.

Growing economic activity in major centres has not only altered patterns of settlement but also resulted in rapid urbanisation. There are five areas of population concentration (including the capital city) and almost all of these are situated in the eastern sector of the country along the railway line. It is estimated that about 50% of the country's population is concentrated in urban villages and towns within a 100km radius of the capital city (NDP8:11). The capital has experienced phenomenal growth over the past three decades. In 1971 it had a population of about 18000 (Republic of Botswana 1991) but by 1991 it had reached 133 468 (Republic of Botswana 1996) far outstripping the projected figure for that year. The urban population in Botswana was put at 46 % (NDP8:24) of the total population for the year 1991. The best facilities tend to be concentrated in urban centres. Similarly the mean income of households varies according to size and type of settlement with households in towns earning the highest incomes, followed by those in urban villages and then those based in the rural areas or small settlements.

Access to cash income has had a huge impact on social structure. While other factors have played an important role in the transformation of the country, the economy has been the dominant factor (Molokomme 1991:52-55). The cash economy has replaced subsistence agriculture as the main focus of economic activity for the majority of the population. Cash earnings are the main source of income for most households. Figures show that in towns cash earnings make up 75% of household income, whilst in urban villages and rural areas it accounts for 63% and 41% respectively (NDP8:24). Other sources include income in kind and, for the rural areas, own produce.

Subsistence agriculture was the dominant sector in the economy at independence accounting for 42.7% of the GDP but by 1994/95 the overall contribution of the sector had shrunk to 4.1 %(NDP8: 19). Agriculture accounts for approximately 2% of formal employment even though informal employment in the sector is quite substantial (NDP8:227). The arable sub-sector has contracted significantly. In contrast cattle remain an important part of life in Botswana. It is probably the symbolic value attached to cattle and the fact that they are perceived as a platform for asset formation that has ensured that many Batswana continue to take an interest in them.

Despite increasing commercialisation, the cattle industry is heavily dominated by the traditional cattle-farming sector. However the ownership of cattle is highly skewed. In 1974/75, 5% of rural households owned 50% of the cattle herd while 45 % owned no cattle at all (Republic of Botswana, 1976). The number of non-cattle owning households has actually increased since the mid-1970s. A UNDP/UNICEF report (UNDP 1990) indicates that the proportion of rural households without cattle in 1991 was between 49% and 50 % (NDP8:77). The significance of cattle ownership should not be underestimated. Several surveys have shown that there is apparently a positive correlation between cattle ownership and access to other sources of income such as wages and transfers in the rural areas (Republic of Botswana 1976; 1988).

Surveys also show that the proportion of rural households living below the poverty datum line increased from 45% in 1974/5 (Republic of Botswana 1976) to over 50% in 1985/86 (Republic of Botswana 1988). However between the latter period and 1993/94 (NDP8:91) the overall proportion of very poor households declined from 49% to 38%. The distribution of wealth in Botswana is clearly very skewed. To illustrate further, the Household Income and Expenditure Survey of 1985/86 (Republic of Botswana: 1988)

showed that the top 20% of the population had a cash income 24 times greater than that of the bottom 20%. Between 1980-1991, Botswana was regarded as the most unequal society in the world amongst countries for which statistics were available (Datta 1994 see also Curry 1987).

Because of rapid economic growth over the last three decades the social organisation of communities at village level especially in the large villages that served as capitals of pre-colonial polities has changed dramatically over the last three decades. One of the unique features of Tswana society is that communities are organised according to a hierarchy of co-residential administrative units (Schapera 1938, Roberts 1971(b), Comaroff and Roberts 1981). The foundational unit is made up of a household consisting of a husband and his wife or wives as the case may be. Next to such a household would be other male-headed households of kinsmen or family group. A genealogically senior member would head the group in its turn. Together with another or other groups of related family groups they constitute a ward, which is the basic administrative unit in Tswana communities.

Traditionally, a headman was the political, administrative and judicial head of the unit. Headmen were answerable to the village chief or paramount chief. The chief was the overall political, judicial and administrative head of the chiefdom. Subject communities had their own headmen who sometimes were from the dominant community or were under the overall supervision of the chief's representative. Thus members of subject groups had much less influence if any over the affairs of the chiefdom than members of the dominant community. Political and administrative activity in traditional communities centred on the *Kgotla*, which also served as the community court. The Kgotla is basically the place where the community meets to discuss its affairs.

Under the customary system the family plays a key role in the dispute process. Families may deal first with disputes on an informal basis but senior members are expected to take a leading role if the matter goes to formal adjudication. There is evidence to suggest that the breakdown of the traditional family is undermining the customary legal system. A study conducted in the mid-1980s found that some women pursuing child support claims experienced some difficulties because of lack of support and co-operation from their families (Griffiths. A 1987, see also Roberts 1972(b)). Dispersal of families all over the country and away from their customary wards also makes the participation of members of kinship groups in dispute processes difficult, however willing they may be to do so. Inability to bring together family members dispersed all over the country emerged in the study already cited above as a significant factor influencing women's decision not to use customary courts to pursue their claims (Griffiths. A 1987).

8.6.3 The Changing Architecture of the State: Meaning of Punishment in the Context of the Modern State

The suppression of customary criminal law and the adoption of a penal code based on the English common law (Chapter One and Chapter Three), not only pushed the philosophy of punishment associated with (the specifically western variant of) the modern state into a position of unassailable dominance, but also seemingly purposely privileged it over indigenous ones (Otlhogile1993, Himsworth1969). Based on general social science literature (Maine 1965, Sack and Aleck 1992, Nader 1992, Lukes and Scull 1983), we can safely assume that the transformation of the law/society relationship, will necessarily translate into the transformation of the hitherto existing meaning(s) of punishment, though to what extent remains a point for debate.

Conceived in relation to the modern state as referred to above, punishment assumes a legal-formal bias that excludes other possible dimensions of this otherwise complex phenomenon (Garland 1990, Garland and Young 1992) in that it is taken to mean state-administered sanctions. This is consistent with the notion that law is state-generated which represents the overwhelmingly dominant view of law in western contexts and in non-western societies that are highly centralized (see Diamond 1973, Kuper and Kuper 1965, Hooker 1975, Griffiths.J 1986). The Flew-Benn-Hart definition (McPherson 1967, Hudson 2003), named after the three individuals who contributed to its development, is thought to capture better than other definitions punishment in the legal-formal sense associated with modern state.

According to the Flew-Benn-Hart definition, five elements must be present for an act to qualify as punishment: it must (a) involve pain or other consequences normally considered unpleasant (b) be for an offence against legal rules (c) be of an actual or supposed offender for his offence (d) be intentionally administered by human beings other than the offender (e) be imposed and administered by an authority constituted by a legal system against which the offence is committed (McPherson 1967:21). Others have sought to extend the model but have not tampered with these five elements (see Hudson 2003:2). While this definition has been criticized for a number of short comings, which we will not concern ourselves with here, it has endured (see Garland 1990:17, Hudson 2003) and remains the baseline definition of punishment in state-dominated societies.

The major problem with the definition lies in its deployment as a generic model of punishment in state-dominated societies without regard for the manner in which states in widely different social formations are constructed. It is suggested here that the meaning of punishment would vary with the architecture of the state so that the Flew-Benn-Hart model may fall short

because it is a peculiarly western invention (see Malila 1993). By the same token absorption of pre-existing states by the modern state would change the texture and meaning of punishment. This is what would appear to be happening in Botswana.

8.6.4 Context: Punishment, Proportionality and Human Rights in Botswana

In many jurisdictions protection against punishment that violates the principle of proportionality is expressed as a prohibition against certain punishments which are considered inhuman, degrading or disproportionate or grossly disproportionate. Many countries, including Botswana, have elevated the principle of proportionality from a mere common law or statutory principle to a constitutionally protected one. In some constitutions the principle has been adopted in the exact form it is expressed in international instruments such as International Covenant on Civil and Political Rights (ICCPR) and African Charter on Human and People's Rights (ACHPR).

Interpretation of the principle may be made in relation to one or both of two dimensions of punishment namely, the type and quantum of punishment (van Zyl Smit and Ashworth2004, von Hirsh1990;1992). In terms of the former, certain types of punishments should be proscribed because they are inherently inhuman, cruel, degrading or unusual, while in terms of the latter the severity of punishment must be consonant with the seriousness of the offence.

Botswana's constitution, protects against 'torture or to inhuman and degrading punishment or other treatment' (S7 (1) Constitution Botswana) a formulation that is similar to that contained in article 7 and 5 of the ICCPR and the ACHPR respectively. As there is no international legal definition of a cruel, inhuman or degrading treatment ('torture' which often forms part of

the list of prohibited conducts under various instruments, is the exception in this regard) each country has tended to develop its own interpretation, though reference is often made to international human rights norm/jurisprudence (see Tshosa 2001). As a result of differences in approach, the scope of protection against torture, inhuman and degrading punishment varies between countries. It is therefore not surprising that Botswana has carved its own approach in relation to the interpretation of these terms.

It would seem that as part of its strategy to ensure that it retains control over the definition or interpretation of torture, inhuman or degrading punishment, the government of Botswana entered reservation upon ratification of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment. The reservation restricts the meaning of 'torture 'to 'torture and inhuman or degrading punishment or other treatment prohibited by Section 7 of the Constitution of the Republic of Botswana'
(http://www2.ohchr.org/english/bodies/ratification/4_1.htm2008).
However, Section 7 of the Constitution does not provide a substantive definition of torture and inhuman or degrading punishment or other treatment. The interpretation has been left to the courts which have generally been rather circumspect in their interpretation, largely to avoid being seen to be usurping the role of parliament (see e.g *Clover Petrus*) .

This does not, however suggest that the courts do not recognize that some punishments may be inherently inhuman in nature. In *Moatshe,* the court (per Tebbutt at p25) quoted with approval the observation by Gubbay J.A in the Zimbabwean case of *Ncube vs. S (1988)LRC 442* where he said punishments such as the rack, the thumbs screw and other punishments of a similar nature are inherently inhuman and degrading. The court also observed that

excessive imprisonment is by its nature also inherently inhuman and degrading.

Nevertheless, Botswana is one of the few countries that have retained two forms of punishment that have been abolished in many jurisdictions, namely corporal punishment and capital punishment. In Botswana, the use of corporal punishment in both judicial and non-judicial contexts is lawful. As indicated earlier, corporal punishment is widely used as a device for social control. Like corporal punishment, capital punishment is a lawful sanction but its use is extremely restricted. It may only be deployed by the higher courts in appropriate cases.

Both corporal punishment and capital punishment have proved to be very controversial sanctions (Shumba and Moorad 2000, Tafa 2002,). For example the controversial nature of corporal punishment was brought into sharp focus by a diplomatic row that erupted between Botswana and Zimbabwe over the punishment of illegal immigrants from the latter in a customary court at Mahalapye towards the end of 2004 (Midweek-Sun 07/01/ 2004, The Mid-Sun 28/01/2004. The Herald 03/02/2004). The problem at the heart of this diplomatic row was initially as much about the standard of justice observed in customary courts as it was about the appropriateness of the punishment imposed by the court but punishment became the dominant theme as the debate evolved and developed. The controversy led to the African Commission on Human and Peoples' Rights (ACHPR) sending a mission to Botswana in 2005 to query the use of corporal punishment on Zimbabweans with the government of Botswana.

Similarly, the death penalty has in recent years been the subject of much criticism from local and international human rights organizations. The execution of Marietta Bosch, a South African citizen for murder in 2001

attracted greater attention from international human rights organizations than executions in Botswana usually do. The South African Human Rights Centre tried to get the president of South Africa to intercede with the president of Botswana on behalf of Bosch while the African Commission on Human and Peoples' Rights met after the execution to consider contentious issues around her execution
(http://www.ditshwanelo.org.bw/may017pres.html 2002).

In cases of where the constitutionality of the death penalty has been raised before the Court of Appeal, the court has found itself constrained to conclude that since the death penalty is legally provided for in the constitution, the court has no power to proscribe it without appearing to be legislating. Thus even if the court agreed with the sentiment expressed elsewhere around the world that the death penalty amounted to torture, inhuman or degrading punishment, it cannot do more than to merely exhort parliament to consider banning it. The point was most forcefully made by Aguda JA in *Ntesang v State 1995 BLR 151.* Speaking on behalf of the court in that case, Aguda observed that,

> "....despite that the death penalty may be considered, as apparently has been elsewhere, to be torture, inhuman and degrading punishment or treatment, that form of punishment is preserved by subsection (2) of section 7 of the constitution. I have no doubt in my mind that the court has no power to rewrite the constitution to give effect to what the appellant has described as progressive movements all over the world , and to give effect to the resolution of the United Nations as to the abolition of the death penalty. I however express the hope that before long the matter will engage the attention of that arm of the government which has the responsibility of effecting changes

which it may consider necessary to further establish the claim of this country as one of the great liberal democracies of the world".

The courts have taken a similar view regarding the question whether corporal punishment is inhuman and degrading punishment. While apparently deploring corporal punishment and hoping for a change of attitude on the part of the legislature, in *Clover Petrus* the Court of Appeal held that corporal punishment per se is not inhuman and degrading as it is a lawful sanction. It seems clear that the courts are reluctant to tackle the question whether certain types of punishments are inhuman and degrading even if they may think so for fear of being seen to be assuming legislative powers.

While the court did not declare corporal punishment as such to be inhuman and degrading in *Clover Petrus*, it nevertheless held that the application of strokes in instalments amounted to inhuman and degrading punishment. So it was not so much the type of punishment as the method of administration of the punishment that the court found to be unacceptable. *In Desai* the court deleted corporal punishment when it was by law required to order its use in combination with other punishments to punish drug-related offences. The court found that the deployment of such a combination of punishments amounted to inhuman and degrading punishment.

In Botswana corporal punishment is used on children and young persons both as a lawful sentence and a popular disciplinary measure (Leslie 1969, Shumba and Moorad 2000). Under the Penal Code, the Customary Court Act, and Criminal Procedure and Evidence Act (305), corporal punishment may be applied on young persons below the age of 18 years as a lawful sanction for crime. It is also used as a disciplinary measure in schools(Education Act), the home, in penal settings and in institutions charged with the care

of children and young persons (Prisons Act (S 108 and109) and the Children's Act (S 20).

On the other hand , there has been an attempt especially under the Children's Act (1981) to protect children from indiscriminate and excessive use of corporal punishment generally, and to shift emphasis away from the use of corporal punishment on child offenders. This attitude was confirmed and underlined by the Court of Appeal in *State v Molaudi and others* (1989) BLR 24. In that case the court described the general spirit of the Children's Act, especially Section 28, as being non-punitive.

However, since the Children's Act permits the use of corporal punishment (S29), it does not make a complete break with traditional cultural patterns. Furthermore, not only does the Customary Court Act and Penal Code, appear to contradict the Children's Act but more importantly, they are inconsistent with the Beijing Rules (Rule 17.3) which prohibits the use of corporal punishment on children. Furthermore, it appears that the enactment of the Children Act has not been marked by a decisive shift in the way the courts handle cases involving children. A report on juvenile delinquents (Hisayi 1995: 10) observed that cases involving juveniles were not handled according to the Children's Act. The study found that the most common punishments in cases involving juveniles were corporal punishment, followed by fines while probation or other welfare oriented approaches were hardly used.

The courts in Botswana appear to be taking inspiration *(Moatshe)* from the leading South African case of *S v Dodo 2001(3) SA382* where the judge who was speaking for the court, observed that, 'the concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman and degrading' even though they have not seemingly gone as far as the South African court did in so far as it declared any punishment which is

not proportionate to be cruel, inhuman and degrading. Even though S7(1) of the constitution of Botswana does not make an explicit link between disproportionality and punishment that amounts to torture, inhuman or degrading punishment, the challenges relating to disproportionate punishment have relied on that clause, as have courts' interpretations of the same. As we noted in Chapter Four of this thesis disproportionate punishment is prohibited by both statute and the common law. It has only been indirectly elevated to the level of a constitutional principle through S7(1), if it is conceded that the provision is in some way concerned with disproportionality as the courts would appear to assume.

In *Moatshe,* Tebbutt, speaking for the Court of Appeal observed that when considering the question whether mandatory sentences were inhuman or degrading, the court proceeded from the premises '(a) that although the legislature is empowered to prescribe mandatory minimum sentences, it cannot enact penalties that would amount to cruel, inhuman or degrading, in conflict with the Constitution and (b) whether prescribed punishment is in such conflict is a matter for decision by the judiciary.'

It is evident from *Moatshe's* case that in Botswana, for a punishment to be held to be inhuman and degrading it must be 'grossly disproportionate'. It is not enough for a sentence to be simply 'disproportionate' hence the court cautioned that 'not every disproportionate sentence can be stigmatized as being a constitutional violation. It will only be a violation where the sentence is so unfit having regard to the offence and the offender as to be grossly disproportionate.'

It is not clear to what extent this test is an improvement on *Shoto* in terms of the protection it affords against harsh punishment. It will be recalled that the test set out in *Shoto* was that punishment must not be so severe ' as to induce

a feeling of shock'. Like was the case before, it is for the court to make a determination, using its own value judgment whether a sentence is grossly disproportionate. However the value judgment must be based on objective factors, 'regard being had to the contemporary norms operating in Botswana and the conspectus of values in civilized democracies of which Botswana is one'.

8.6.5 Value Conflict and Institutional Discord within the Legal System

The introduction of the penal code and suppression of customary criminal law was a radical step that did not allow for gradual assimilation of the new values and principles as had been the case during the colonial era (Schapera 1970, Gulbrandsen 1996). It involved the total replacement of one type of law with another. As we have observed the concessions such as those were in respect to some aspects of procedure and, to a limited extent with respect to choice of punishment.

Furthermore, there was no attempt to determine what possible areas of conflict there might be between customary law principles and those of the English common law (penal code). Ironically before the introduction of the penal code an attempt was made to reconcile English common law principles with those of the Roman-Dutch law even though the latter was going to be replaced by the former (Republic of Botswana 1965). To avoid any conflict between the Code and Roman Dutch civil law, the government engaged a consultant who was familiar with the Roman Dutch system and English law to study the Nyasaland Penal Code with a view to eliminating or keeping to a minimum the areas of conflict. It is apparent that while an effort was made to reduce the possibility of conflict with Roman Dutch law, there is nothing in the records to suggest that similar efforts were invested to avoid conflict with customary law and the difficulties that

might be presented by the general relation between customary civil and customary criminal law.

Furthermore there was no attempt to determine to what extent the penal code was consistent or relevant to the needs of a rapidly changing society. This was as true for Botswana as it was for other African countries. This was/is a penal code based on 19th century English law which has not kept up with developments in the English law. Botswana like other African countries (Tanner 1972, Hatchard 1985, Coldham 2000) has not so far given priority to reform of the criminal law or criminal justice since the universalization of the penal code. There was bound to be tension between the two legal systems since received law tends to emphasize retribution and deterrence (Coldham 2000:230) even where customary courts would prefer to deal with certain offences in their own peculiar ways. The shift towards alternative to custody and liberalization of punishment in general that has been taking place around the world has not yet happened in Africa on an appreciable scale (Tanner 1972, Hatchard 1985). Botswana is no exception in this regard. It was only in 2004 that Botswana amended the penal code to allow substitution of custodial sentences with non-custodial penalties in relation to certain offences. This happened not as result of a change in philosophical outlook regarding punishing, but rather as an attempt to ease overcrowding in prison. The substitutes were ramped up so that they would not be seen as softer options.

Some of the problems relating to conflict between the customary legal system and the received legal system are caused by failure to properly reconcile the two systems (see generally World Bank1996). For example, there was no proper tidying up of the constitution to remove any doubts that might exist regarding the subsistence of customary criminal law following the universalization of the penal code (Brewer 1974, Otlhogile 1993, Frimpong

and McCall-Smith 1992), even though it would appear that as far as the higher courts are concerned the case of *Bimbo v State* settled any lingering doubts on the matter. It will be recalled that in that case the High Court overturned a conviction by a customary court of the defendant who had been charged with adultery under customary criminal law on this particular ground. The High Court held that adultery was neither an offence created by the Penal Code or other written law and as such the conviction could not be allowed to stand. As far as some scholars are concerned, the continued existence of customary criminal law remains, at least theoretically, both uncertain and contentious not least because of the ambiguous nature of the written law test (Brewer 1972; 1974, Otlhogile1993).

The written law requirement is expressed in the constitution as follows: 'no person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law' (Section 10(8) of the Constitution of Botswana). However, Otlhogile (1993) has suggested that the written law rule applies to common law rather than customary criminal law.

It would seem that section 10 (12) of the Constitution is consistent with this proposition. It reads (i.e. section 10 (12)) thus in part:

> 'Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of:(e) Subsection (8) of this section to the extent that the law authorises a court to convict a person of criminal offence under customary law to which such a person may be subject'.

It is clear that the constitutions does not on its own, provide a conclusive view on whether and/or to what degree customary criminal law is exempted from the written law test. The written law requirement in Customary Courts (Amendment) Act (1972) is just as ambiguous as the one in the constitution on the question of the subsistence of customary criminal law. Brewer (1974)

has suggested that the requirement could be interpreted in two ways. It could mean that customary courts are allowed to charge a person with a criminal offence as long as all elements of such an offence in the relevant written law are not different from those in the customary law. Alternatively customary courts could invoke customary criminal law as long as the offence is of the type created by the penal code or written law. Brewer seems to argue more strongly in an earlier article that the first interpretation is probably the correct one : 'it seems certain that the theoretical effect of section 4 of the Act is to eliminate any customary offence of a nature not included in the Penal Code or other written law'(Brewer 1972: 285). S 11(3) of the CCA seems to strengthen the view that the customary courts are/were at the very least not expected to adhere strictly to written law in that it provides that 'in the exercise of the jurisdiction under the provisions of this section customary courts may be guided by the provisions of the Penal Code.' It not clear what is meant by the phrase "guided by". Roberts (1971(a):206) has speculated that it was probably meant to exempt Customary Courts from strict adherence to the Penal Code to allow them to familiarise themselves with the Code in years following its introduction in these courts.

The words 'may be guided' seems to leave open the possibility that they may not be so guided. It has an open texture about it. The notion of guidance has caused confusion as to what it was intended to mean. It is possible that the use of the phrase 'may be guided' was inspired by a pattern suggested by a colonial administrator at a conference on ' The Future of law in Africa' in 1959 (BNA 1965) where it was proposed that 'guidance' did not mean that an indigenous court could convict an individual under customary law or with reference to specific provisions to the Penal Code. He explained it thus:

"Our conception of guidance is really procedural. I would like to read the relevant passage in the White Paper on this subject. It says that in matters of procedure a native court cannot be expected to observe all the details of a new code of criminal procedure for some years to come. The Panel has therefore recommended that it should be regarded as sufficient if a court has informed the accused of the offence of which he is alleged to be guilty without framing any formal charge under any specified section of the Penal Code. That is to say the native courts need not frame a formal charge provided that they acquaint the accused with the offence with which he is charged".

In general terms, as far as punishment is concerned, there was no attempt to examine the use of various penalties or interventions in the customary and general courts. More importantly there was no attempt to determine the normative meanings of different punishments for the two legal systems. No attempts were made to re-conceptualize punishment to ensure that it embraces dimensions of the phenomenon that are 'customary', or to make it sufficiently elastic to allow varying interpretations of what constitutes customary values and principles that might be proffered by those interpretive communities that may have a stake in the customary criminal process.

8.7 Effects of Sentencing Disparities on the legal System

Proportionality

Ideally and generally, sentencing standards and sentencing formulae are expected, if they are not to produce unfair or unjust results, to restrain judicial discretion sufficiently enough to ensure that 'like cases are treated alike' while at the same time giving judges enough discretion to ' treat different cases differently.' To violate any of these two limbs of what one

writer has referred to as the 'equality injunction' (Tonry 1992:32) can only produce iniquitous results which could bring the administration of justice into disrepute.

As we noted in Chapter Four of this thesis disparities are not in themselves unacceptable. In fact the basic model that Botswana follows allows judges very wide discretion indeed. We observed in Chapter Four that judges in Botswana have, on the whole, very substantial powers in relation to sentencing matters. The restraints on their powers are few, and where they exist, fairly loose. This in effect means that disparities are a normal feature of the system. Furthermore, having customary and received courts operating alongside one another suggests that framers of the Constitution and legislation governing trials in both systems contemplated or expected that value-based differences between the two legal systems would result in different sentencing outcome patterns. To that extent both intra- system and inter-system disparities are to be expected.

However, as even the equality injunction suggests, not all types or magnitudes of disparities whether intra-system or inter-system are acceptable. As a rule it is disparities that are regarded as capable of offending the ordinary person's sense of justice (*see Shoto*) or those that the court would find offensive to justice normally which are referred to as 'unjustified' or 'unwarranted'. Still there is no consensus regarding the kind of disparities that ordinary people would regard as 'unwarranted'. In Chapter Four it was correctly observed that the term disparity cannot be meaningfully employed without reference to context (Galligan 1986: Tonry 1996:186). Notwithstanding this observation, Tonry (1996) has proffered a generic notion of 'unwarranted' disparities. He observed that, "... 'Unwarranted' disparities exist when sentences in general are disproportionate to the relative severities of offences for which they are imposed" (Tonry 1996:187).

This definition seems wide enough to capture the various forms of disparity that are the subject of this thesis.

Customary and general courts would appear to have different tests for determining whether or not a sentence is unwarranted. As stated in Chapter Four and Section 8.8.4 of the present chapter, in terms of Section 17 of the Customary Court Act, all customary courts are prohibited from passing a sentence that is 'disproportionate' while the higher courts will strike down any sentence which is 'grossly disproportionate'(*Moatshe*) and therefore offensive to S7(1) of the Constitution of Botswana).

The existence of different disparity tests for each type of court raises the question as to how inter-system disparity may be measured. We observed in Chapter One of this thesis that the question whether the values and standards of justice in the customary and general courts are or should be comparable has not only divided public opinion in Botswana sharply, but it has also become a recurrent theme in public debates about the criminal justice system as a whole. But in fact, as far as criminal matters are concerned the legal system as a whole is premised on comparability of justice in the customary and general courts so that the question is more about the degree of comparability rather than whether comparability is desirable.

A number of factors would appear to argue strongly in favour of the notion that comparative justice was intended to be the goal of the dual legal system in Botswana, especially after independence. First, it is implausible that comparable justice was not the desired end when it was the lack of comparability between the two legal systems during the colonial era that triggered the shift towards universalization of criminal law in Botswana and elsewhere in Anglophone Africa (Barton et al 1983, Allott 1965; 1971;1984). During the colonial period, it was accepted on an official level that no

presumption could be made that the type of justice dispensed by the customary courts was or ought to be similar or comparable to that dispensed by the general courts. In contrast, post-colonial justice, especially in the area of criminal law was based on a radically different premise: trials must be conducted by separate courts applying one basic law according to roughly comparable standards (see for instance Barton et al 1983).

Second, the direction of reforms in the area of criminal law since the colonial period, including reforms, appear to have been intended to ensure that the use of corporal punishment in triable-either-way offences in customary and magistrate courts was for similar offences. Third, the desire for convergence is evident from the steps that were taken when criminal law was universalized in 1972 to ensure that, broadly speaking, important rights enshrined in the Constitution were observed in the system as a whole, thus ensuring the constitution served as the *grund* norm for both legal systems. Fourth, the dominance of and priority accorded to the common law system together with notions of justice based on the principles associated with that system over those associated with the customary legal system suggest it was expected that over time the latter would assimilate the values and principles of the former or that it would eventually be phased out as some scholars have suggested (Brewer 1974) (a) the implied continuing evolution of the customary principles presumably in the direction of and in accordance with modern principles of justice (b) that the received system being the dominant system where the customary system appears to fall short of the ideals of justice the presumption is that it should follow the lead of the former if possible. Thus the structural arrangement of the courts and the statutory and constitutional framework allow for and presume differences in the way received and indigenous courts approach criminal cases while ensuring comparability. Thus it can be inferred from this that the differences in

outcomes in criminal cases were not really intended to exceed tolerable limits.

Two factors made it imperative to find a test that could adequately capture relative and non-relative aspects of proportionality without completely ignoring the tests that each type of court is required by the law to apply. The first problem is the gap between the proportionality tests employed in the two systems. As noted above customary courts may not pass sentences that are 'disproportionate'(S7(1)) but the higher courts (general courts) will interfere only when a sentence is 'grossly disproportionate'(*Moatshe*).

If we take the disproportionate test employed by customary courts we find that it is far from satisfactory if employed without regard to what happens in the general courts. Such an approach produces iniquitous results such that we find that punishments imposed by customary courts for a particular offence are not comparable in severity/leniency to those imposed by magistrate courts or where sentences imposed for lower level offences in one court rival those of higher level offences in the other court as findings of this study indicate.

Even if we assume that quanta of the punishments awarded by customary courts make sense in context of the 'internal relativities' of the customary system, perceived sentencing powers deficit or if we were to concede that the customary system should be considered on its own for reasons of 'culture' or public approval, a number of objections relating to the principle of proportionality still remain. For a start, the severity score ranges, and the degree of variability in combinations of multiple punishments imposed by customary courts in relation to any given offence category means that there were wide disparities in the punishment of the same type of offence or offences from the same band of offences by the same court at

different times (intra-system disparity). Both of these factors undermine comparative proportionality of offences within bands of offences.

If we rely on the test of 'gross disproportionality' preferred by the general courts, we will find that sentences are in themselves or in comparison to those awarded by the general courts for similar offences are disproportionate and will most likely never get the attention of the higher courts. It is evident that the threshold required for intervention, namely that the sentence should be 'grossly disproportionate'(*Moatshe*) or of such severity 'as to induce a feeling of shock'(*Shoto*), is too high. The result is that what such policing of sentencing as the higher courts might be able to do would only be concerned with outliers or extreme cases. There is considerable scope for the courts, especially customary courts, to pass sentences that in and of themselves or in comparison with those awarded by magistrate courts, may induce a sense of injustice without necessarily failing the gross disproportionality or shock test.

It may be argued that there is no need for the general courts to concern themselves with disparities of a general nature since there already exist lower levels appeal and review mechanisms that could identify and deal with such disparities. But the existing mechanisms are not equipped to address this type of disparity for a number of reasons. As we saw in Chapter seven customary courts judges were generally hostile to reviews by the Customary Courts Commissioner and the District Commissioner as they felt that the latter's interference with sentences undermined their authority and power. General sentencing patterns, therefore, tended to go unchallenged. The Customary Court Commissioner and the District Commissioner might also be dissuaded by practical considerations from trying to interfere with sentences to an extent that would alter the general patterns. It would be impractical to alter too many of the cases as it would

result in the two offices being overwhelmed by the caseload. Furthermore, these two mechanisms (even the customary court of appeal) lacked the comparative perspective of the higher courts to be able to anchor sentences properly in relation to those awarded by general courts. In any case very few cases tried in customary courts actually go to appeal (Boko 2000).

It is reasonable to conclude that a more universal disparity test that takes into account the standards internal and external to each systems is required. The notion of 'unwarranted' disparity put forward by Tonry (1996) overcomes many of the limitations evident in the two tests discussed above and would appear to be suited to the task in that it allows us to evaluate disparities within and between systems.

Were Disparities in the Punishment Awarded by the Courts Unwarranted?

If we consider the severity score ranges, and the degree of variability in combinations of multiple punishments imposed by customary courts in relation to any given offence category we can see that there were wide disparities in the punishment of the same type of offence or offences from the same band by the same court at different times. This suggests a high degree of inconsistency in the sentences passed by customary courts. By contrast the score ranges for punishments awarded by magistrate courts for corresponding offences were very narrow and the variability of punishments very limited, implying relatively high levels of consistency in the sentences. The degree of inconsistency in customary court punishments as well as that between them and those awarded by magistrate courts cannot be justified.

Multiple punishments awarded by customary courts may be regarded as unjustified by reason of their severity. There does not appear to be any clear relationship between seriousness of offence and punishment severity so

that score values pertaining to what should ordinarily be regarded as low level offences often compete with those of somewhat higher offences.

It may be argued that different levels of discretion give the courts the opportunity to punish in accordance with their ethos, but this is doubtful since the multiple punishments meted out by customary courts neither represent the customary system nor do they reflect ways of the introduced system.

Instead the punishments awarded were harsher than those that would have been imposed by customary courts in the past and those imposed by magistrate courts currently. The question that must asked is why even minor offences would be regarded as representing what would appear to be such a threat to the public that they must be punished in the way that they are by customary courts? If punishment is based blameworthiness on the offender, what are the implications of having a system that is inconsistent in the way it lays blame and punishes offenders?

The seemingly haphazard way of punishing offender violates the presumed parameters and logic of offence ranking. It cannot be acceptable that similarly situated offenders should suffer or be at risk of suffering significantly different punishments for similar offences simply because their cases have been sent to different types of courts for trial. If a punishment imposed by one type of court for a minor offence like common nuisance exceeds that of fairly serious offences like Assault Occasioning Actual Bodily Harm, then that offends the ordinary person's sense of justice and would also tend to undermine the offence ranking system that underpins the Penal Code. It therefore, stands to reason that the legislature never intended to authorize such a degree of difference in sentencing outcomes nor would it have contemplated that any part of the system could in the normal course of events, punish beyond what is necessary to curb unwanted behaviour.

This study has shown that differences in the structure of discretion of customary and magistrate court judges, together with other factors, introduce a disparity of a qualitatively different nature from ordinary disparities that might be expected in the generic discretionary model operating in the general courts as discussed in Chapter Four of this thesis. In particular this study found that differences in the structure of discretion as to combination of punishments together with attitudes, orientation and normative practices combine to produce unjustifiable disparities in the punishment of offences.

Sentencing Discretion, Fairness and Equality

Apart from objections pertaining to proportionality, disparities raise a number of other issues that have a bearing on the public confidence in the criminal justice system as a whole such as human rights, fairness, and equality of treatment. Some of these issues have dominated the public discourse on inequities of the criminal justice system in Botswana in the past forty years or so (Baillie 1969, Kirby 1985, Boko 2000, Tshosa 2001).

Amongst the general objections against unnecessarily severe punishment is that it raises questions about the value the customary courts impliedly attach to the rights of those tried in such courts if such severe intrusions on rights and other deprivations are going to be visited individually for relatively minor transgressions (see von Hirsch 1992). This is particularly serious given the limited protections afforded those tried before such courts (Chapter Four) and the propensity of customary courts to convict (Chapter Five).

One of the problems raised by excessive punishment is that whatever the intended objective of punishment may be, human beings, should not, according to Kant, be used as a means to an end(von Hirsch1990:280-1). Others have suggested punishment by its very nature diminishes 'positive

freedom' (Cavadino and Dignan 2003:55). Therefore, on that basis it should be kept to a minimum or even avoided where it is possible to do so. Excessive punishment adds to a generally corrosive atmosphere in which the value of human rights is denigrated.

Flexibility clauses in the Penal Code (S28 (4)) and the Customary Court Act (S17 (3)) relating to punishment of young persons as well as differences in the discretion of the courts regarding choice as to combination of punishments causes some defendants to suffer unnecessary prejudice and to that extent, therefore, undermines the principle of equality before the law, or at least non-discrimination. This issue in turn raises questions regarding fairness and non-discrimination within the legal system. The principle of equality before the law finds expression in Botswana's Constitution through Section 15, which forbids discrimination on the basis of race, tribe, and place of origin, political opinions, colour or creed. It will be noted that Section 15 does not mention certain groups thus effectively leaving them open to discriminatory practices.

The people most likely to suffer prejudice would be those appearing before customary courts generally and young persons specifically. The latter would be likely to suffer disproportionately harsh punishment not only because of the insistence by customary courts presidents that cases involving young persons be channelled to them but also because such courts would already have implicitly assumed a hostile posture towards young persons. Amongst youthful offenders as a group, young males are at the greatest risk of suffering unfair treatment. Unlike other groups, they are subject to corporal punishment because of the flexibility clauses in Section S28 (4) and Section 17(3)) of the Penal Code and the Customary Courts Act respectively. In these circumstances it cannot be argued that citizens have an equal chance or

choice of being tried in either forum. By extension they do not have any equal chance of being convicted or suffering certain kinds of punishment.

8.8 Dualism and Social Change

Just as the nature of dualism has been changing constantly since the advent of the dual legal system (Chapter Three), so it has been changing in the area of criminal law since the reforms of 1972 due to a myriad of factors, not the least of which include changes in social structure, expansion in opportunities for education, a growing culture of human rights(Boko2000) Molatlhegi1997), adoption of international protocols on criminal justice standards(Tshosa2001), shifting cultural and life style patterns(Roberts1971 (b), Griffiths.A1983) and the changing dynamics in the relationship between the two legal systems (Griffiths.A1983; 1997). This may explain, to a certain extent, the persistent and growing concerns about differences in the standards of justice rendered by the received and customary courts. The results of the present study underscore the need for reform.

Implications: Reconciling Legal Institutions -General

One of the challenges currently facing post-colonial societies across the world in the area of criminal law is that of finding ways to incorporate indigenous practices and principles in the criminal process, including sentencing, in ways that are consistent with the national constitution and human right practices (see Findlay 1997, Cain 2001). The second problem is to find ways of doing so that reflect a dynamic rather than a static notion of culture in order to remain in tune with changing life styles and social complexities of developing societies (McLachlan 1988).

Traditional institutional pluralism is not only based on a static approach of the law/culture relationship but also stresses cultural identity at the level of nation/group at the expense of internal group and individual lifestyle

diversity (Greenhouse 1998, McLachlan 1988). Thus it takes a rather narrow view of what group identity means in respect of the law/culture matrix. Even when taken on its own terms this approach has the effect of suppressing diversity within identified 'cultural groups' in that it ignores differences among the constituent elements of traditional societies. In that way it may, for instance reflect only traditionalist or lawyer's interpretations of customary law rather than the living law (see Molokomme 1995).

In Africa attempts at reconciliation of legal systems that followed in the wake of all Africa conferences on the future of customary law (Allott 1965;1971;1984) were in the mould of official pluralism which emphasised the law/culture opposition based on the interpretation of culture in the strong sense (see Greenhouse 1998,Dembour 1996). It also reflected the rigidities infused into the system through harmonization of criminal law and legal institutions in that it did not appear to recognize import of the continuing dynamic between legal systems.

The static view of the relationship between legal systems is being increasingly challenged (Merry 1988, Griffiths. A 1997). The Australian Law Reform Commission has suggested that the way forward may lie in what has been termed the 'functional recognition approach' to customary law (McLachlan 1988). The approach represents a fundamental shift away from the traditional approach to plural legal systems, primarily but not exclusively because it suggests that the relationship between state law and indigenous law should be regarded as both a dynamic and an *'indefinitely continuing phenomenon.'* It recognizes and acknowledges the diversity of the aboriginal life styles and does not limit their choice as to which system they can use in pursuit of justice. There is increasing recognition of this important dynamic even in jurisdictions that traditionally did not even recognize relevance or

importance of indigenous dispute resolution mechanisms in the lives of ordinary people or at least certain section of their populations.

Some countries like Canada, Australia and some Pacific Islands whose legal systems traditionally did not provide for the recognition or accommodation of indigenous legal institutions and/or their ways of resolving disputes have become more open to the latter's ideas and principles. It has been suggested that in Africa where the set up is dominated by western style courts and ideas about punishment, African perspectives on justice remain excluded largely from the criminal justice system (Tanner1972, Coldham 2000), while the integration of indigenous and received systems in Africa was expected to take a long time (Read 1963, Allott 1965; 1971), it has not been systematic and focused.

In the area of criminal law, there is an increasing push internationally, for countries to re-design their legal systems in such a way that they accommodate and tap into indigenous legal systems' methods of dealing with disputes even if those systems are not formally integrated into the recognised legal system.. For instance, Canada has been exploring and experimenting with the aboriginal concept of the Sentencing Circle in criminal process for sometime (see Green 1998). A variety of international instruments such as the Convention on the Rights of the Child (1990) (article 40(1), Declaration of Basic Principles for Victims of Crime and Abuse of Power (1985) (Principle 7) and United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules 1990) encourage the incorporation and use of methods, principles and measures beyond those traditionally associated with state sanctions to deal with accused and convicted persons.

Reconciling Legal institutions: Specific Lessons for Botswana

It has been suggested that contact between the customary and received system in Botswana has engendered conflict (Otlhogile 1993), concord or mutual adaptation (Griffiths. A 1983), and domination (Otlhogile 1993) of one by the other. No one interpretation holds true for all dimensions of the entire relationship all of the time or across all branches of law. Different things might happen at different contact or nodal points so that the relationship generates tensions, contradictions, connections, divergences, disjunctions and shifts as dynamics change (Merry 1988).

The present study shows, however, that as far as matters relating to punishment are concerned, the dominant feature of the relationship between the two systems is conflict. Some of the conflict emanates from issues which it is generally officially thought were settled in 1972 or through precedents such as the case of *Bimbo v State,* which was thought to have resolved once and for all the question whether any court in Botswana could try and punish someone for a customary criminal offence that is not found in the statute books. However, it appears that for customary courts the question of suppression of customary criminal law and the triumph of legal formalism is not yet settled. As data from interviews with customary court judges in the present study shows, and as the case *of State v Bogatsu and others* clearly illustrates, there is continuing resistance to legal formalism by the customary system. Thus, conflicts regarding the appropriate approach to disputes, more precisely, their nature and substance, and how they ought to be resolved seem set to continue for sometime into the future.

Thus the criminal process, including sentencing, requires a systematic process of reconciliation at value, process and institutional level in order for confidence in the criminal justice system as a whole to be restored. More specifically, it needs to adjust sufficiently to such changes as may have occurred in the customary and general system and the wider society, to

ensure that the ethos of comparable standards, implicit in the original quest for comparable justice that animated early reforms, is not lost.

In Botswana there is no explicit provision in the law that indicates an objective or intention to promote customary approaches to punishment. However, indigenous approaches to the dispute are given limited recognition but not necessarily specific recognition. In the case of punishment it appears that it is expected that through choice of punishment the 'customary attitude' would manifest itself. Other ways in which customary approaches have been implicitly recognized is in the non-separation of civil and criminal elements in criminal cases attracting compensation. But it must be recognized that even procedures around compensation and fine appear to accommodate customary approaches, the context of the use of these punishments may be changing their meaning and symbolic value.

Perhaps the way forward is to create space for positive aspects of both indigenous and received legal systems through systematization of principles relating to punishment. In the case of customary law this could be through an exercise similar to the Customary Law Restatement Project which was taken by the University of London in the areas of personal law in the period immediately following independence. The tricky question is how these processes are merged and/or recognized. For instance, while current rules recognize reconciliation, the formal process does not allow reconciliation to run concurrently with other processes: should this change? Through a process of review suggested above, positive principles of the customary dispute process such as reconciliation could be absorbed into the legal process while at the same time recognizing that they may be appropriate for certain types of disputes but not others.

Similarly, there needs to be sensitivity to the fact that in a society that is settlement-oriented like Botswana (Schapera 1938, Comaroff and Roberts 1981), western style courts' 'winner-take-all' or zero-sum game approach to disputes (Seidman 1978:213) can ruin social relationships or leave the disputants unsatisfied with the outcome on a psychological and social level. In traditional communities, most cases involve individuals who are neighbours and relatives/kinsman, therefore resolution of dispute must involve removal of grievance. It must be recognized that flexibility about mediation negotiation/dispute settlement satisfies a need that is deeply felt while the winner-takes-all approach encourages hardening of feelings of hostility between the disputants (Seidman 1978:214).

8.9 Methodology

The present study provides some useful insights into issues of methodology in cross-systems research where the subject of research is the normative practices in systems that are anchored in different legal and social cultures. Studies concerned with norms pertaining to legal systems, especially customary law, are notoriously difficult to execute (Moore 1997, Comaroff and Roberts 1977, Nader1992) partly because customary systems range from the relatively well differentiated to those that hardly recognize the boundary between legal and non-legal orders (Elias1956). Naturally the methods employed in different studies as well as their objectives for concentrating on norms are diverse. So it is to be expected that in addressing this question most writers often talk past rather than to one another (Comaroff and Roberts 1977).

In a study such as the present one, traditional problems of methodology, philosophical and theoretical approaches that are generally associated with 'comparative law' are compounded by the fact that the researcher on indigenous and received law in Africa must contend with legal systems

marked by parallelism, partial or full integration at a general level or characterised by these variations across different branches of law. To add to this complexity the systems involved may differ on socio-cultural and legal-cultural levels or both.

Consequently, a study such as the present one provides some useful lessons regarding the use of quantitative and qualitative methods in a way that serves the specific requirements of the project while avoiding the traditional ideological entanglements associated with the choice of methodology. The objective of the study was to consider variations in relation to norms of a very specific nature (those relating to sentencing) in the context of two legal systems on one level and those of a very general and vague nature on another (process/process values)(see Henham2000). In relation to the former, the starting point was provided by a common offence framework. This meant that the problem of equivalence of concepts was avoided (see Makoba 1992), at least at a superficial level, by the use of common reference points (offences/ punishments). However, I was conscious of the fact that the meaning of these concepts at a descriptive level might not necessarily be consistent with their meaning at a normative level as far as the different courts were concerned, a factor which could very well be the source of differences in sentencing patterns. Thus, it became necessary to understand the meanings attached to these concepts at a deeper level and these were uncovered through interviews, court observations, general literature and case law. The study sought to make meaningful comparisons regarding outcomes of cases and punishments in two types of courts without ignoring the significance of rules or processes (see Comaroff and Roberts 1977; 1981, Summers 1974).

Yet it was necessary to prioritise different aspects of the investigation according to the primary objective of the study and I found that the Mixed

Method Strategy (MMR) provided me with a framework that transcends the rigidities of traditional methods.

8.10 Call for Further Research

I observed in the opening sections of this thesis that remarkably little empirical research has been done on the comparative aspects of the criminal process in ordinary and customary courts in Botswana despite the topicality of the subject. This thesis has attempted in its own modest way, to close that gap in the area of sentencing. One of the ambitions that this study set for itself was to find out whether the differences in the structure of discretion of judges of customary and magistrate courts as regards the punishments they may impose not just in cases involving similar offences but also those involving similarly situated offenders, produces significantly different outcomes. Accordingly, we tried to measure the effects (outcomes) of variations in the discretion as to choice or substitution of punishments taking into account what we have termed legal and non-legal variables. Unfortunately thinness of data prevented that part of the exercise from being executed fully or to yield more conclusive results than those presented in this thesis. This is a question which future research could address using a larger data set spanning a longer period than that covered by supplementary data used in this study, which was four years for this particular data set, could answer.

8.11 Recommendations: Policy

The major findings discussed in this section of the concluding chapter take us back to issues and concerns that triggered the need for a study of this nature in the first place. We observed in Chapter One of this thesis that the question whether the values and standards of justice in the customary and general courts are/or should be comparable has not only divided public opinion in Botswana sharply, but it has also become a recurrent theme in

public debates about the criminal justice system, as a whole. The disparities relating to the deployment of multiple punishments underscore the importance of this issue.

It is, therefore, imperative that adjustments should be made that would make sentencing outcomes in the customary and general courts more comparable. One of the more radical solutions that have been proposed is that criminal jurisdiction of customary courts should be removed completely (see Boko 2000 for example). However, it may not be practical to remove the jurisdiction of customary courts over criminal matters as has happened in some neighbouring states. As we noted elsewhere in this thesis, customary courts handle the majority of criminal cases processed by the courts in this country so much that some have argued, perhaps, justifiably, that the criminal justice system could not possibly function without them (Bouman 1984). More crucially, customary courts have a far greater reach into the rural areas than the general courts. If the government were to attempt to replace all the customary courts with general courts it would have to be prepared to incur heavy financial costs which it almost certainly cannot afford given budgetary constraints that have emerged in recent years.

Having said that, policy makers may want to consider whether it is desirable or whether it serves the interests of justice that cases tried before customary courts should be imprisonable. In some jurisdictions lay judges may not try imprisonable offences if they are not sitting with a trained lawyer on the bench or do not have a clerk who is a trained lawyer to advise them. This study found that one of the factors that had the effect of making punishments harsh was that the courts are allowed to combine imprisonment with any number of other penalties. In order to reduce unjustified differences in outcomes, customary courts' discretion as to combination of punishments should be restricted or reviewed such that they cannot combine punishments

in ways that would make them seem iniquitous. To that extent, the use of different combinations of punishments should be specified and the allowable number of punishments in respect of the offence stated. This should be done with the object of ensuring that punishments available to customary courts are comparable even if different from those that magistrate courts would impose for similar offences. More radically, lawmakers could formulate guidelines for customary courts along the lines of the Minnesota model (see Tonry 1988).

From another perspective it seems that the overall menu of available punishments was rather limited in that it did not include disposals that would obviate the need to resort to unnecessarily harsh punishments to punish lower-level offences. It is recommended in that regard, that the menu be extended to include punishments not currently available to adult courts such as probation and supervision orders. In addition substitutability of punishments should be reviewed to ensure that alternate punishments are generally of roughly equal severity.

More generally, it seems that customary courts are unlikely to relinquish their traditional role as mechanisms of social control whose mandate has always been wider than that contemplated by the law (eg Customary Court Act) in the near future. To allow them to continue to exercise these wider functions without offending the written law requirement or resorting to the criminal process in order to deal with minor misconduct, the government could introduce legislation that gives them flexible power along the lines of United Kingdom's Anti-Social Behaviour Act 2003. It would allow intervention outside the framework of criminal law with the possibility of entry into the criminal justice system in cases where such intervention fails to produce the desired effect.

APPENDIX A: Structure of Courts

Lower Customary Courts

Lower customary courts are presided over by headmen, who also serve as ward heads in large villages or village heads in smaller settlements. Lower customary courts may not sentence any person to a period in excess of six months. There is growing evidence from research which suggests that customary courts generally, and lower courts in particular, continue to deal with certain types of disputes informally before they proceed with formal adjudication as they would have done in the past .Magistrate courts are known to refer cases of domestic violence to Customary Courts for reconciliation and mediation.

Chief's Court

Before they were brought together under the state system different chiefs' courts served as the courts of last instance for various tribal communities. Despite the emergence of new overarching structures like the Customary Court of Appeal Chief's Courts continue, to a large extent, to perform this function at district level. Today they also serve, to a greater extent than before, as courts of first instance (Schapera: 1970: 5) In terms of the relevant enabling statute this grade of court may not sentence any person to a term of imprisonment exceeding one year.

Urban Courts

Urban courts perform the same functions as other customary court except that they do so in urban context. There is one crucial difference between urban courts and other customary courts: they do not have the same links with the communities they serve that the latter have. It is consequently not clear whose customary law is applicable in such courts.

The Customary Courts Commissioner (abolished 2001)

The Customary Courts Commissioner advises the Minister of Local Government and Lands, on matters pertaining to customary law. S/he is also charged with supervising and guiding all customary courts.

Customary Court of Appeal

The Customary Courts of Appeal is the highest court in the customary courts structure. The jurisdiction of the Customary Court of Appeal is mostly appellate though it must be pointed out that it has original jurisdiction in certain areas that are out of the reach of lower customary courts. The decisions of this court are appellable to the High Court. This is the point at which the customary court system and general system converge. The Customary Court of Appeal was set up as recently as 1986 even though it has apparently been provided for since shortly after independence.

Ordinary/General Courts

Magistrate Courts

Magistrate courts in Botswana can trace their lineage to (colonial) courts like those in England so named were presided over by laypersons. During the colonial period the magistracy comprised of a class of administrative officers with no legal training who had powers to carry out judicial functions. The District Commissioner and District Officer (Administration) continued even after independence to perform quasi-judicial functions.

Today only professionally trained lawyers preside over cases that come before magistrate courts. Magistrates (The Magistrate Courts Act the Laws of Botswana Vol1 Chapter 04:03) fall into four Grades: chief magistrate, principal magistrate senior magistrates, magistrate grade Magistrate Grade II and I' all of whose jurisdiction varies according to seniority. The Magistrate Act 60(1) (The Magistrate Courts Act 60(1)) gives the Chief and Senior

Magistrates 'jurisdiction to try any offence, except an offence, which is punishable by death or imprisonment in excess of 21 years.' Magistrates' courts probably rank second after customary courts in terms of the volume of criminal cases they handle per a year.

The High Court

The High Court has unlimited original jurisdiction. Apart from being a court of first instance it entertains appeals from both Magistrates Courts and the Customary Court of Appeal. It also has the power to supervise proceedings in the lower courts if it considers that it is in the interest of justice to do so. Recently the High Court started sitting in circuit around the country.

The Court of Appeal

The Court of Appeal is the ultimate court in Botswana. Its main function is to hear appeals from the High Court. It became the court of final appeal in 1973. (Otlhogile 1994:37). Prior to that, decisions of the Court of Appeal in the Botswana, were, like those of similar courts in a number of other independent Common Wealth Countries, appellable to the Judicial Committee of the Privy Council in the United Kingdom.

APPENDIX B: Sentencing Powers of Magistrate and Customary Courts

The jurisdiction of chiefs and magistrates as regards punishment is subject to certain limitations. This section gives an overview of the sentencing powers of the judges of the courts under discussion and the menu of punishments generally available to them. Sentencing powers of all judicial officers are shaped first and foremost by the Constitution which is the primary normative framework for the legal system as a whole. The Constitution provides not only that no person may be convicted of an offence unless it is defined by written law but also that the penalty for such an offence must be prescribed by written law (section 10(8) Constitution of Botswana). Offence-creating sections of the Penal Code generally prescribe the appropriate penalty for each offence and where they do not; section 33 of the Penal Code, which provides for a general punishment, is applicable (Section 33 of the Penal Code). In such cases a prison term of not more than two years, a fine or both of these, may be imposed. In every other instance therefore the court must inflict the penalty prescribed or its substitute, unless otherwise provided or exercise its discretion to suspend the sentence caution the offender or discharge him/her without proceeding to conviction.

A court of competent jurisdiction may impose any of the following punishments where such are prescribed in relevant provisions of the offence-creating statute: (Section 25 of the Penal Code).

a) Death
b) Imprisonment
c) Corporal punishment
d) Fine
e) Forfeiture
f) Finding security to keep the peace and be of good behaviour or come up for judgement

g) Any other punishment provided by the Penal Code or by any other law

The last category (g) presumably includes extramural labour and a discharge without punishment. Lower courts, including magistrate courts do not have the jurisdiction to try offences that attract the death penalty such as murder.

(i) Substantive Jurisdiction: Magistrate

Magistrates do not have a blank cheque regarding other offences either. The sentencing powers of magistrates differ according to rank or grade. (Section *61* Magistrate Court (Amendment) 1999). Magistrates may not inflict punishment which exceeds that which the law prescribes for a particular offence except where they have been authorised by the Chief Justice through a statutory instrument to do so.

Chief Magistrates: 15 years' imprisonment or P45 000 or both. Where corporal punishment is applicable they may impose a maximum of 12 strokes. A Principal Magistrates is allowed a maximum of 12 years imprisonment or P30 000 or both. S/he is also allowed to impose a maximum of 10 strokes. Senior Magistrates: 10 years' imprisonment or P20 000 fine or both. They are allowed a maximum of nine strokes where corporal punishment is specifically sanctioned by the law. Magistrates Grade I: 7 years' imprisonment or P15000 fine or both. Magistrates Grade II: 5 years imprisonment or P10 000 fine or both. Where applicable Magistrates Grade I and Magistrate Grade II, may impose a maximum of 7 strokes and 5 strokes respectively.

(ii) Discretion and Punishments in Magistrate courts: choice and substitutability of punishments.

<u>Imprisonment</u>

The courts have been given considerably greater discretionary powers in this area than in others. Judges are allowed to impose a prison term of any length they deem fit for offences punishable with life imprisonment or any other period as long as they do not exceed the specified maximum. Furthermore, they may in the case of an offence punishable with imprisonment impose a fine in addition to or instead of imprisonment. Custodial sentences are applicable to all categories of offenders with the exception of young offenders under the age of 14 years (Section 27(1) Penal Code).

Corporal Punishment

Use of corporal punishment is restricted to those offences for which it is specifically authorised by the law (Section 28(1) of the Penal Code). The court is obliged in law to specify the number of strokes to be administered and may in any case not impose a sentence of more than a dozen strokes or more than half a dozen if the convicted person is under the age of 18 years (Section 28(2) *PC*).

As a form of punishment corporal punishment is not universally applicable to all categories of offenders. Females and males who have been sentenced to death and males who in the opinion of the court are more than 40 years of age are not subject to corporal punishment. The court has the discretion to impose corporal punishment instead of or in addition to imprisonment in the case of any male under the age of 18 found guilty of an offence punishable with imprisonment.

Fines

Fines are usually specified under the offence-creating statutes. Where the law does not state the amount of the fine to be imposed the court may impose any amount it deems fit though it should not be disproportionate to the offence committed. With regard to those offences where a fine is imposed the

court will direct that if the convicted person fails to pay he or she will serve a prison term of some specified length. Otherwise the term of imprisonment which a defaulter may suffer is determined according to the scale below;

Amount	**Maximum Period**
P10 or less	14 days
More than P10 but less than P20	1 month
More than P 20 but less than P100	3 months
More than P 100 but less than P 400	4 months
More than P400	6 months

Other Disposals

The court may discharge the offender without punishment where it believes the case has been proved but feels it would not be sensible for a specified reason not to punish the offender.

(i) *Substantive Jurisdiction: Chiefs*

Sentencing powers of chiefs differ according to the rank of the officer concerned and tribal territory in which he is operating (Establishment and Jurisdiction of Customary Courts Order). These powers are set out in the warrant of each officer.

The Minister of Local Government may vary the warrants from time to time (Customary Court (Amendment) Act, 2001). Most criminal matters that are handled by customary courts fall within the category designated 'criminal matters' in the warrants. These offences are punished in conventional ways described in this chapter. Customary courts have been given enhanced sentencing powers in respect of Stock Theft and Drug and Drug-related offences. I have outlined below the sentencing powers of judges at Mochudi court. The warrants were last revised in 1999.

Paramount chief and deputy chief: (Court Warrant)

	Months	Compensation	Bovines/Equines	Goats	Strokes
Criminal matters	36	P2000.00	20	80	6
Stock Theft	120	P5000.00			6
Drugs and Related	96	P8 500.00			6

Senior Chief's Representative (Court Warrant)

	Months	Compensation	Bovines/Equines	Goats	Strokes
Criminal Matters	18	P1000.00	13	50	5
Stock Theft	108	P4000.00			5
Drugs and Related	84	P8000.00			5

Chief's Representative:

	Months	Compensation	Bovines/Equines	Goats	Strokes
Criminal Matters	12	P600.00	8	40	5
Stock Theft	96	P3000.00			5
Drugs and Related	72	P7 500.00			5

Sentencing: Sentencing in Customary Courts

Introduction

A customary court may sentence a person who has been convicted to a fine, imprisonment, corporal punishment or a combination of these providing it does not, amongst other things exceed its jurisdiction (Section 17(1) Customary Courts (Amendment) Act). Courts may also bind a convicted to keep the peace (Section 18(1)*CCA*). The court may, where a charge has been proved, and having regard to certain factors, discharge the accused without proceeding to conviction if s/he thinks that it is 'inexpedient to inflict any punishment.' (Customary Court procedure Rule 19(1)).

Customary courts are not bound to impose sentences that are prescribed in the offence-creating sections of the Penal Code and other laws except where they are otherwise required to do so (Section 49, *CCA).* So the punishment or mix of punishments that a court imposes in any particular instance is a matter entirely at the discretion of the court.

By extension, the maximum penalty that a customary court may impose for a particular offence is entirely independent of the maximum prescribed by the penal code and other statutes for that offence. The upper limit in each instance is a function of the sentencing powers of the judge presiding over the case (S11 (2) CCA). Before the latest amendment to the Customary Court Act became effective in January 2002, there was some restriction of a general nature limiting the period of imprisonment which any higher customary court could impose to 12 months (Section 11(2) Customary Court (Amendment) Act 1997). That restriction has been removed.

However some fetters have been placed on the exercise of these discretionary powers to the extent that the court is prohibited from inflicting punishment which is 'not in proportion to the nature and circumstances of the offence and the circumstances of the offender'(S 17(4) Customary Court (Amendment) Act, 2002). However it is not clear how proportionality and circumstances of the offender are to be determined.

Corporal Punishment

Until the latest amendments to Customary Court Act became effective in 2002, corporal punishment was, with the possible exception of cases involving offenders under the age of 18 years, restricted to a limited category of offences.

All ordinary offences triable in customary courts are now potentially punishable with thrashing. Prior to the aforementioned amendment, offences that could be punished with corporal punishment included a number of offences which form much of the staple of customary trials: Assault Occasioning Bodily Harm, Burglary, Stock Theft and Offences Contrary to the Stock Theft Act (Schedule under Customary Court (Amendment) Act *1997*).

Females or anyone who the court considers might be over the age 40 years may not be sentenced to corporal punishment (S 17(2) Customary Courts (Amendment Act). In respect of males under the 18 years, the court has discretion to order that they receive punishment in addition to or in place of other punishments (S17(3)CCA).

Fines

A customary court may punish any offence with a fine. A fine or any part of a fine may be used to compensate the victim of a crime providing s/he agrees not to pursue a suit for damage or injury suffered for the same offence (Section 25 *CCA).* In practice courts prefer to keep fines and compensation awards separate.

The scale for determining punishment in cases of default is as follows :(section 24(1), Customary Courts (Procedure) Rules).

Amount	**Maximum Period**
P1 or less	14 days
More than P1 but less than P2	1 month
More than P 2 but less than P10	3 months
More than P 10 but less than P 40	4 months
More than P40	6 months

Compensation

Compensation awards do not require elaborate procedure to determine the level of the award to be made nor is a special application necessary before a compensation order can be made. Compensation awarded may be in money or in kind (S 24(1) Customary Courts Act).

A customary court may order the attachment and sale of the offender's property if s/he fails to pay the amount awarded or any instalments as required(S 24(4) CCA). Where the court has decided that a default of payment will be punished with imprisonment the term of imprisonment should be such as would 'satisfy the justice of the case. (Rule 29(1) Customary (Procedure) Rules). The scale for determining the period of imprisonment is the same one used in the case of defaults on fines. However, the offender is entitled to have the term of imprisonment imposed in default of payment of a fine or compensation proportionately reduced on payment of part of the fine or compensation ordered (Rule 29(3) Customary (Procedure) Rules).

Suspended Sentences

There are two types of suspended sentences that a customary court can impose. It may after convicting the offender postpone the passing of sentence for a period of not more than three years on certain condition(s). If after expiration of the period, the offender has not breached the conditions of recognizance the court may discharge him without imposing any sentence.

If the court is minded to impose a different form of suspended sentence it may pass a wholly or partially suspended sentence subject to certain conditions for a period of not more than three years.

Binding Over

If it so chooses a court may, instead of or in addition to any other punishment, cause a convicted person to enter into a bond in amounts determined by the courts itself, 'on condition that he shall keep the peace and be of good behaviour for a period not exceeding three years' (S18,CA).

Discharge without Conviction

A court may under certain circumstances discharge an accused person without proceeding to conviction (S 19(1) CCA). It may do so, if having taken into account certain factors such as the age of the accused or the trivial nature of the offence, it considers that it would not be prudent to inflict any punishment. The court can only discharge the accused person without proceeding to conviction if it believes that the charge has been proved. However, for purposes of restoring any property that may be involved in the case to its original owner or purposes of seizure of such property by the state the case is regarded as being in no way different from any other where a conviction has been made(S 19(2) CCA).

APPENDIX C: Prescribed Punishments for Common Offences under the Penal Code

Table 23 : Prescribed punishments – common offences

General Class of Offence	**Offence**	**Offence Creating Statute**	**Mandatory Maximum (more discretion)**
Assault and related offences	AC	S 246 Penal Code (PC)	Imprisonment not exceeding 1 year.
	ABH	S 247 PC	Imprisonment not exceeding 5 years with or without corporal punishment.
	UW	S 233 PC	Imprisonment not exceeding 7 years
Property Offences	TC	S 271 as read with (ARW) 264 PC	Imprisonment not exceeding 3 years
	Stealing from dwelling	S 275 PC	Imprisonment not exceeding 10 years
	SBS	S277	Imprisonment not exceeding 7 years
	SS(Stealing Stock)	274PC	Imprisonment not exceeding 14 years.
	HB	300 (1a)	Imprisonment not exceeding 10 years
	Burglary	300 (2)	Imprisonment not exceeding 14 years
Other Common Offences	UIL		Fine not exceeding P50 or imprisonment not exceeding 3 months or to both.
	CN		Imprisonment not exceeding 1 year.

Keys: AC – Assault Common; ABH-Assault Occasioning Actually Bodily Harm; UW-Unlawful Wounding; TC-Theft Common; SBS –Stealing By Servant; HB-House Breaking; UIL- Use of Insulting Language; CN- Common Nuisance

APPENDIX D: *Technical deficiencies in the presentation of cases: Police Prosecutors and Police Investigating Officers*

Illustrative examples of technical difficulties encountered by untrained/poorly trained personnel

Case 1

Prosecutor (PR): At the police station were you issued with a medical report form

Prosecution WitnessNo1 (PW1): yes

PR: How can you identify the same?

PW1: If the police showed it to me

Interpreter: if they showed it to you how would you be able to tell it is the form in question?

PR: by the injuries I suffered

PR: what else?

Interpreter: how else can you identify it?

PW1: I can tell by the injuries only

PR: Do you know where the injuries are written on the form?

I don't know whether the doctor wrote them down according to how I described them to him or not

PR: But how do you know that it is the one filled in by the doctor?

PW1: He gave it to me after completing it and I took it to the police

PR: your worship I am making an application for the form to be admitted in evidence

Magistrate: But there is no clear evidence how he will identify it. How will he identify it? What else can you identify it with?

PW1: Because I gave it to the police

Magistrate: No-no .We is not in dispute that you gave the police the form we want you to tell the court how can identify it

PW1: By the signature

Interpreter: Whose signature?

PW1: My signature

PR: It bears whose signature?

Interpreter: whose signature? Whose signature are you saying is on the form?

PW1: How do you mean?

Interpreter: Supposing I lost my blouse and the police recover it I should be able to tell them how I can identify it – may be it has burn marks or some buttons are missing I would have to tell them about all that.

PW1: I can tell by the injuries that it is the correct form if the doctor recorded what I told.

Magistrate: But you said you don't know how to read or write and now you want to tell this court through signature

PW1: I said through injuries I showed him my injuries

Magistrate: What kind of form was it?

PW1: Its just form

Magistrate: Is that it

PW1: Its long time since I last saw it

Magistrate: We want to know the identity features of the form

You can't remember the form?

PW1: If I saw it again I could tell whether or not it was the one

Case2

Pw2: I traced the accused Lebang Mosweu and interrogated her. Her explanation to me was that she burnt…

Magistrate: inadmissible

PW2: When I interrogated her she explained that… when I interrogated her she appeared to make a confession statement and it also looked like there were some elements of provocation. I therefore took her to the District Commissioner who is empowered accept such explanations and she

submitted her confession statement. Which I wish to produce before this court as part of evidence

PR: How can you identify the confession statement?

PW2: that statement is typed and bears the District Commissioner's signature

PR: What is his name?

PW2: the District Commissioner is Mr Ongadile

PR: What else? I think that is all about the statement. Sorry it explains that the accused burnt the....

PRO: What are the identity features of the statement?

PW2: That is all I can remember about the statement

PR: Your worship I wish to make an application for the statement to be admitted

Magistrate: But there are many statements done by the District Commissioner from time to time. What is particular about this one? Yes what else do you remember about the statement?

PW2: It's dated 25th September 2000 and bears the names of the accused person. I indexed the number A25 on the statement in my own hand

PR: I make application for the statement to be admitted

Acts intended to cause grievous harm

Case 3

PR: Did you get a report of acts intended to cause grievous harm from the complainant on the 7th of July 2001?

PW2: Yes

PR: What did the complainant say the accused used to try to stab him?

PW2: The complaint said the accused had an Okapi knife. He drew an Okapi knife.

PR: Did the complainant mention the colour of that knife to you? Did you ask the complainant about the colour of the knife?

PW2: He said it was an Okapi knife

PR: I am talking about the colour not the type. The colour..?

PW2: Yes .Did the complainant mention the colour of the knife to you?

PR: No. he said it was an Okapi knife, which I believe is brown in colour.

PW2: Did he say it was brown in colour?

PR: No - I believed it was brown

PW2: You believed it was brown – that is not what you were told by the complainant? He just said it was an Okapi knife but..

PR: And you took it to be a brown knife?

PW2: He never mentioned the brown colour

PR: Who brought in the brown colour then?

PW2: No one brought it in. Myself I just believe it was brown. He never mentioned the brown colour.

PR: Don't tell this court what you believe. Tell the court what the complainant told you.

PW: The complainant said the accused tried to stab him with an Okapi knife

The complainant wanted to know how the court should believe there was a knife used. Do you mean that if the exhibit is not available there is no offence committed?

An act has been done though the knife is not here as part of the evidence.

Magistrate: Did you investigate the case?

PW2: Yes

Magistrate: Were you satisfied with the investigation?

PW2: My investigation…uhmm I am satisfied with it

Magistrate: Were you satisfied with the investigation?

PW2: I am satisfied with it

Magistrate: Do you honestly believe that you have done enough investigation in this case?

PW2: Yes

Magistrate: Why so? What makes you think you have done enough already?

PW2: I tried to see what he had been trying to use to stab the complainant but unfortunately the accused said he got the knife… the knife was not his he just got it from a vehicle

Magistrate: When he told you that you thought that was enough for you as the investigating officer

PW2: Yes your worship

Magistrate: Even though you felt he was misleading you still felt it enough?

PW2: Yes

Magistrate: Even though he had misled you still felt you investigation was enough?

PW2: Yes. I thought it was enough

Magistrate: You still felt it was enough

PW2: Yes

Magistrate: You talked of the accused person using a knife... saying that the owner of the vehicle they were using took the knife. Did you follow the same vehicle to collect the knife?

PW2: No your worship it was already … it was nowhere to be found as the defendant said he just got a lift from the vehicle and vehicle was nowhere to be found

Magistrate: Who was the owner of the vehicle?

PW2: He said he just got a lift from the vehicle so I didn't confirm that

Magistrate: Did you ask him about the owner of the vehicle?

PW2: No I didn't

Magistrate: Evidence of the hammer – there was an allegation about him using a hammer?

PW2: I did interrogate the complainant about him using the hammer on the defendant

Magistrate: So you didn't believe that the complainant also used a hammer?

PW2: No

Magistrate: What made you not to believe?

PW2: I couldn't believe because those we just allegations

Magistrate: Why didn't you ask him to produce the hammer that was mentioned by the accused person?

PW2: (Silence)

Magistrate: The accused person told you the complainant had used a hammer why didn't you ask the complainant about it?

PW2: To do what with it

Magistrate: As part of your evidence

PW2: No I didn't get it from the complaint as part of evidence... we are talking about the knife which...

PR: That is all your worship.

Defendant: Do you want to tell the court that you didn't trace me because you believed me

PW2: I traced you and then you said the knife was not yours

Defendant: How should the court believe that a knife was used?

PW2: It cannot believe because it is not in front... because it has not been produced here

Case 4

PR: Constable, can run this one past me, what offence is the accused charged with?

PW2: Assault occasioning bodily harm

PR: I want you to explain something to this court. You charged the accused charged the accused with assault occasioning bodily harm I want to know whether when the complaint came to report the incident he appeared to be injured or was the swollen wrist the only problem

PW2: The wrist was swollen and the doctor confirmed

PR: How did the doctor confirm – verbally or did he write anything down?

PW2: I gave the complainant a doctors' report form, which he later returned to me.

PR: What is the procedure? Is it not the procedure that once you have received such a report form from a complainant you file and when the time comes for you to give evidence you produce the report before the court as part of your evidence confirming that the complainant was in fact assaulted?

PW2: It is true that such a report must be produced in court

PR: I want to know who is supposed to produce the report.

PW2: The investigator

PR: Now since you are the investigator in this case why have not produced the report?

PW2: I forgot

PR: Through carelessness?

PW2: It wasn't careless I just forgot.

PR: I heard you say that the complainant told you he had been assaulted. Did he indicate to you whether any instrument was used on him during the assault?

PW2: His walking stick

PR: Is not procedure for the investigating procedure to take away such an instrument so that it can be produced in court as part of evidence?

PW2: It is the procedure

PR: Now did you produce the stick as part of your evidence in this case?

PW2: No. Because the (Mr X) complainant uses it as his walking stick

PR: Are telling this court, if I may use your own words, you are saying you did not take the stick away because Mr X the complainant uses it as a walking stick, if I may ask, supposing someone has been murdered using a knife, are you telling this court that you would not take away the knife simply because it is used around the house/home to cut meat?

PW2: That is different

PR: Do you consider the object's uses to the owner or whether it has been used as weapon?

PW2: Well I do consider whether it has been used as weapon

PR: What was your primary concern here?

PW2: That it was his walking stick – he uses it to support himself

PR: And that was the cause you were going to follow regardless of what the laws says? That all you were thinking about?

PW2: Yes.

PR: Why? Is that your idea of how things should be done?

PW2: He uses it to support himself.

PR: I see. That is your idea of how things should be done.

APPENDIX E: Profile of Kgatleng District and Mochudi

DISTRICT PROFILE:

Population of Kgatleng District in 2001: 73 507

Males: 35 734; Females: 37 773

Household Heads: 51.3% households were headed by females

Economically Active Population (employed and unemployed) in the District: 27 550

Employed Persons: 22 032

Unemployed Persons: 5 518 (or 20%)

MOCHUDI VILLAGE PROFILE:

Settlement Type: Peri-Urban/Major Village

Functions: Headquarters of Kgatleng District; Traditional Capital of Bakgatla-ba -Kgafela

Population of Mochudi in 2001: 39 349

Population Growth1991-2001: 25 525-39 349

SOURCE: *Kgatleng District Development Plan6:2003-2009*

APPENDIX F: Interview Instrument

Section 1: Biographical Information

1) Age _

2) Gender_

3) Education: Primary

Junior Certificate

Senior School

University

Other (specify)

4) How long have you been Presiding Officer/Prosecutor/Court Clerk?

5) Did you receive any training related to your present job? If yes specify?

6) What kind of work did you do before you took up your current job (as a magistrate/chief)?

7)Do find that your previous experience helps in your work as a presiding officer/prosecutor/court clerk? How?

8) Do you think specialist training is necessary for this job? Why

Section 2: Role Perception

9) What do you perceive your role in the court room as a presiding officer to be?

10) What is your role in relation to a) Assessment of Evidence b) Sentencing?

11) Does the having no prosecutor in some of the cases affect your role in anyway? (Chiefs only)

12) Does your role change in cases where the defendant does not have a legal representative?(Magistrates only)

Section3: Types of Cases Handled by the Interviewee

13) What types of criminal cases do you handle?

14) Which are the most common?

15) When do these offences generally occur?

16) Where do they take place?

17)What do you think is/are the major cause(s) of the most common offences (theft, assault, burglary ,whatever the case may be)?

18) Which of these cases do you find the most difficult to deal with and why?

19) Which of these cases do you find easiest to deal with? And why?

20)Do you think there have been any changes in the pattern of crime since you started work as presiding officer in this jurisdiction?

21)If yes, explain what has changed ? Why?

Section 3 Range of Powers

22) What range of disposal of options do you have?

23) Which if any involve mandatory sentencing?

24) Which cases if any, involve any element of discretion in sentencing?

25) Do the available disposal options accord with the type of punishment you would like to see imposed for assault/theft /burglary etc.?

26What level of evidence is required for a conviction in assault / theft cases?

27) What does the prosecution (complainant/court as the case maybe) need to prove each case?

28) Is there any benefit for the defendant of pleading guilty?

29) What verdicts are possible on offences charged (theft, assault)?

30) What factors do you generally take into account when sentencing in assault/theft etc cases?

a) aggravating b) mitigating

31) What kind of sentences do you tend to impose in assault/theft etc cases ? Why?

Magistrates Only

32) Have you ever invoked S 316 of the Criminal Procedure and Evidence Act (CP&E) (i.e order the accused to pay compensation to the victim)?And Why?

33)If you do, for what type of offences do you order the convicted person to compensate the victim?

34) Can you remember any cases within the past 12months where you made such an order?

35) Have you ever called for reconciliation in a criminal case in terms of S321 of the CP&E? If so how often?

36) In what sort cases have you done this? Why?

37) What sort of parties were involved in cases where you felt it necessary to promote reconciliation?

38) Do you in such cases order proceedings to be stayed?

39) Have handled any such case over the past 12 months?

Chiefs'/Urban Courts Only

40) Are there any cases you have handled where there was no prosecutor?

41) How common are these?

42) What type cases generally tend not have prosecutors?

43) How do they compare with those led by the prosecutor?

44)Do complainants receive any assistance from the court in delineating the relevant issues?

45) What offences are handled by each of the two police forces (Botswana Police and Local Police)? Why?

Urban Courts Only

46) What/whose customary law applies in your jurisdiction?

47)Are there any guidelines as to which customary law to apply in particular cases (e.g civil cases where tribal is expected to apply)?

48)Do you receive any complaints from defendants/complainants who may be concerned about which customary law is going to apply in their cases?

49) What do you do in such cases? If the case involves:

a) a criminal matter b) a civil matter

Section 4: Interface between Courts

50)How do you relate to the Magistrate/Chief's court in your district as far as criminal cases are concerned?

51)What type of cases are transferred from the Magistrate to the Chief's court and vice-versa courts? Why?

52)Are there any instances you can remember where you had to exercise your revisory powers over customary courts in your area ? Why? (Magistrates only)

53) Who initiated the motion for revision? (Magistrates only)

54) Have you ever had a case you have tried revised by a magistrate? Why? (Chiefs only)

55) Who had initiated the motion for revision? (Chiefs only)

Section 5General Views on the Criminal Justice System.

56) What do you see as the main objectives of the criminal justice system?

a)punishment b) rehabilitation c)mediation d) incapacitation etc

57How well do you think these objectives are met in practice?

58) How effective are the magistrate courts, the High Court and Customary courts in meeting these objectives?

59) What are the advantages and /disadvantages of the approach to justice and procedures that are adopted in each type of court?

60) What improvements would you make to the running of the criminal justice system?

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